IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-910

OCCIDENTAL OF UMM AL QAYWAYN, INC.,

*Petitioner,*

—v.—

CITIES SERVICE OIL CO., *et al.*,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Occidental of Umm Al Qaywayn, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

### Opinions Below

The opinion of the court of appeals (App. A, *infra*) is reported at 577 F.2d 1196. The opinion of the district court (App. B, *infra*) is reported at 396 F.Supp. 461 (W.D. La.).

### Jurisdiction

The judgment of the court of appeals was entered on August 9, 1978. On October 31, 1978, Justice Powell issued an order granting to the petitioner an extension of time through December 7, 1978 within which to apply for cer-

tiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## Questions Presented

1. In an action between American citizens concerning title to property illegally confiscated abroad and brought into the United States, did the court of appeals err in declining jurisdiction on the ground that the ownership of an island contested between two foreign states involves a political question, when no such issue existed because no matter who owned that island, the confiscated oil before the court was extracted outside of that island's three-mile territorial water limit?
2. Where the Executive Branch of our Government has repeatedly proclaimed a three-mile water limit rule and applied it to the very territories involved in this case, must not the Federal Court follow such rule in deciding the case, instead of declining jurisdiction?
3. Did the court of appeals err in surrendering its judicial function upon the suggestion of the Legal Adviser of the State Department that it should not decide this case?
4. Does not the political question doctrine merely require the courts to follow an executive determination as here, rather than create a judicial vacuum by depriving the courts of jurisdiction?
5. Is not the issue in this case, which the court of appeals has denominated a "political question", indistinguishable from an act of state issue, and therefore within the Hickenlooper mandate that "no court . . . shall decline . . . to make a determination on the merits"?



6. Even if the court of appeals was not bound by the Hickenlooper Amendment, did it err in disregarding the strong Congressional policy embodied in it, which requires judicial determination of the property claims of victims of foreign confiscations?

## Statutory Provisions Involved

United States Code, Title 22 §2370(e)(2).

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: Provided, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law . . . or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

## Treaty Provisions Involved

Convention on the Continental Shelf of April 29, 1958, 15 U.S.T. 471, TIAS 5578; 499 U.N.T.S. 311, effective as of June 10, 1964), article 2, paragraph 1 and article 6, paragraphs 1 and 2.

"Article 2

"1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

"Article 6

"1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

"2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

## Statement of the Case

This case involves crucial constitutional questions that transcend the hundreds of millions of dollars at stake here. All of the parties are American corporations. The petitioner attached crude oil in the United States. It was extracted from a location in the Persian Gulf included within an oil concession that was validly granted to the petitioner, and later confiscated without payment of compensation, in violation of international law. The respondents have thus far persuaded the courts to refuse jurisdiction of the dispute, thereby preserving an immune "thieves market" in the United States for confiscated property.



The district court declined to try the case and granted summary judgment for the respondents on the ground of the "act of state" doctrine. The court of appeals affirmed on what it called a "slightly different ground"—that the case presents a "political question", and is therefore not a "case or controversy".

### A. The Facts

The basic issue in this case is simple, and not "unmanageable" as held by the courts below. Despite the geographic details and the exotic sheikhdoms involved, the case is determined by the three-mile territorial water rule which has been applied by the United States for nearly two centuries.

Umm Al Qaywayn ("Umm") and Sharjah are two of the Trucial Sheikhdoms (now known as the United Arab Emirates), located on the southeastern coast of the Persian Gulf. For over a century until November 30, 1971, the United Kingdom was the protecting power over the Trucial Sheikhdoms, including Umm and Sharjah. By treaty, the United Kingdom was in charge of the international relations and defense of the Sheikhdoms and had jurisdiction over their territories, including their territorial waters. This treaty was recognized by the United States. No oil concession could be granted by any of the Trucial Sheikhdoms without the approval of the British Government.

In 1964, the Rulers of Umm and Sharjah entered an agreement under the auspices of the British Government establishing the seabed border between them. The agreement was based on an admiralty chart delineating the boundary between the continental shelves of Umm and Sharjah, and showing the continental shelf of Umm as extending to the three-mile limit of the territorial waters of the island of Abu Musa. This tiny island is situated about forty miles off the coast of Umm and Sharjah, and had for centuries been under the exclusive sovereignty of Sharjah.

On November 18, 1969, Occidental of Umm Al Qaywayn, Inc. ("Occidental") a California corporation, acquired from the Ruler of Umm a forty-year exclusive oil concession granting Occidental all property rights and ownership to the oil. Said concession covered all offshore waters of Umm and the underlying seabed, as outlined on a map annexed to the concession. (A copy of the map is reproduced as Appendix C to this petition; a copy of the same map with clarifying identifications is annexed as Appendix D.) The boundaries of the concession shown on the map were identical to the boundaries established by agreement between the rulers of Umm and Sharjah five years earlier, in 1964. Specifically, the map showed that Occidental's concession area extended on the northwest to the three-mile limit of the territorial waters of the island of Abu Musa. Great Britain, as the protecting power, ratified the Occidental concession.

Six weeks later, the Ruler of Sharjah granted an oil concession to Buttes Gas & Oil Co. ("Buttes"). The Sharjah-Buttes concession covered an area that was contiguous with, and did not conflict with, the concession recently granted to Occidental. This too was formally approved by Great Britain.



Occidental promptly conducted extensive seismic tests in its concession area, at a cost of more than $4,000,000. These tests indicated the prospect of oil and gas in large quantities at a location clearly outside the three-mile territorial water limit of the island of Abu Musa, in a location wholly within Occidental's concession area.

Buttes learned of Occidental's oil find and launched a campaign to capture Occidental's property. It notified the British Political Agent in the Trucial Sheikhdoms, on March 25, 1970, that it intended to commence drilling *in the precise location of Occidental's oil find.* A few days later, the Ruler of Sharjah claimed for the first time to have issued a decree, allegedly made six months earlier, on September 10, 1969, and concededly "unpublished" at that. This "secret" decree, which by strange coincidence predated Occidental's approved concession, purported to extend the territorial waters of Sharjah and of its islands, including Abu Musa, from three to twelve miles.

The Sharjah decree was obviously back-dated, and was issued at the inducement of Buttes, to deprive Occidental of its property. The British Government rejected this fraudulent decree, and refused to give effect to the attempted extension of Sharjah's territorial waters. The British Foreign Office advised the Ruler of Sharjah that his attempt to extend the territorial waters of Abu Musa from three to twelve miles violated the 1964 seabed border agreement between Sharjah and Umm, and violated the vested concession rights of Occidental. *The British Government also refused Buttes' request for permission to drill, on the ground that the proposed drilling site was within Occidental's concession area, and outside the Buttes concession area.*[1] Sharjah resisted and the matter was

[1] Britain's express language was: "the location lies in an area which was not included in the concession area specified in the

submitted to mediation. When the mediator ruled in favor of Umm and Occidental, however, Sharjah, in bad faith, rejected the mediator's ruling.[2]

Thus frustrated, Buttes took another tack. It persuaded Iran to assert a claim to the valuable portion of Occidental's concession. Iran, through the National Iranian Oil Company, announced in May 1970 that the Island of Abu Musa belonged to Iran and not to Sharjah, and claimed a twelve-mile limit for territorial waters of the island.

When Great Britain relinquished its rights and obligations as protecting power over the Trucial Sheikhdoms on November 30, 1971, the constraints on Buttes' manipulations ended. Under threat of forcible occupation of Abu Musa by Iran, the Ruler of Sharjah entered into an agreement with Iran providing that Iran and Sharjah would jointly occupy the island; that the oil concession granted by Sharjah to Buttes, including the illegally extended territorial water limits, would be "confirmed"; and that Iran and Sharjah would split the governmental royalties derived from the concession.

Iran then occupied Abu Musa (together with Sharjah) and patrolled the territorial waters extended to twelve miles. Umm had no means to prevent this seizure and occupation of a portion of its continental shelf, and its sovereignty over that portion was terminated by annexation.

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concession agreement between [Sharjah] and Buttes . . . on 29 December 1969 and as approved by Her Majesty's Government at that time and . . . the location lies in an area which was included in the concession agreement concluded at an earlier date between Umm and Occidental . . . ."

[2] The opinion of the court of appeals, through oversight, states incorrectly that *Umm*, rather than Sharjah, "refused to abide" by the mediator's decision. App. A at p. A-5; 577 F. 2d at 1200.



After the annexation, Sharjah and Iran confiscated Occidental's concession in favor of Buttes. The confiscation was uncompensated, and therefore illegal.

Buttes immediately began drilling operations in the very location of Occidental's oil find. Buttes later sold interests in its Sharjah concession to subsidiaries of Ashland Oil, Inc., Kerr-McGee Corporation, Skelly Oil Company and Cities Service Oil Company. Each of these companies, before acquiring its interest, was put on notice of Occidental's ownership of the concession.

In 1974, the defendants began to extract oil from Occidental's concession area and to ship it to the United States. Among these shipments were the three cargoes that were attached in Louisiana in these proceedings. Occidental has also attached some ninety other cargoes in proceedings instituted in state and federal courts in Louisiana and Texas, and in the Virgin Islands.[3]

### B. The Theory of the Petitioner's Case

Occidental's cause of action arises from the following ultimate facts alleged in the complaint:

(a) The Ruler of Umm issued to Occidental a valid oil concession.

(b) Occidental made an important oil find. Thereafter, Sharjah and Iran annexed the area of the oil find.

(c) After the annexation, Sharjah and Iran confiscated Occidental's vested property right in its concession without compensation.

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[3] In every case, by prior stipulation, the oil was released immediately after seizure, upon an undertaking by the consignees to stand good for the value of the cargo.

(d) Buttes extracted the oil from Occidental's concession area and shipped the oil to the United States.

The legal theory of Occidental's claim is simple. After the annexation on November 30, 1971, Iran and Sharjah were obligated to respect vested concession rights within the annexed portion of Umm's continental shelf, under the rule of international law, applied repeatedly by this Court, that a change of sovereignty does not alter vested rights within the acquired territory.[4] The failure of Sharjah and Iran to honor Occidental's vested right in its concession constituted a taking of Occidental's property. Because the taking was uncompensated, it violated international law, and did not confer upon Sharjah and Iran, or upon anyone claiming through them, title to the confiscated concession or to the oil extracted from it.

Occidental's claim arises not from the annexation of Umm's continental shelf, but from the confiscation of its concession by Sharjah and Iran, which occurred after the annexation. Iran and Sharjah have carved up Abu Musa between them. So be it. Occidental does not challenge this *fait accompli*. To put it plainly, there is nothing in the case that will affect the boundary line of any of Iran's territories, no matter where they are. Similarly, the case will not affect Sharjah's or anyone else's boundary lines, no matter where they are.

There is nothing in Occidental's claim that will affect one cent of the royalties now being collected by Iran or any other sovereign from the oil being drilled on the original Occidental site. They have been collected and will continue to be collected without challenge by Occidental. All that is

[4] *United States* v. *O'Donnel*, 303 U.S. 501, 510-11 (1938); *Airhart* v. *Massieu*, 98 U.S. 491 (1879); *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51, 86-87 (1833).



involved in this case is that the oil, which was shipped *into the United States*, and which is the product of an illegal confiscation, is subject to a claim in American courts. No judgment for one cent beyond the property before the Court is requested or can be granted.

The respondents have, by complex argument and fear thoughts of involved issues, persuaded the court of appeals that this case is "unmanageable." Aside from the fact that American courts decide far more complex issues, the fright approach is an unworthy one. If the courts withdraw from deciding this case they return to the day when the United States was looked upon as a haven for stolen property and was the delight of thieves, to the consternation of the rightful owners. It was to eliminate this immoral position in which the United States found itself, aptly called the "thieves market", that Congress directed the courts to decide cases like this one. 22 U.S.C. §2370(e)(2).

### C. Proceedings Below

Shortly after filing its complaint, Occidental served on Buttes a request for production of documents.[5] The defendants responded with a motion to stay all discovery, and a motion to dismiss the complaint. The motion was converted into a motion for summary judgment at the court's suggestion. The matter was submitted without an evidentiary hearing and with virtually no discovery, on the basis of the defendants' concession that they would not controvert any of the facts pleaded in the complaint. In reliance on this concession, the district court granted the defendants' motion to stay discovery. *For purposes of this*

[5] Civil Action No. 74-868 ("Dauntless Colocotronis") is an *in rem* action in admiralty. Buttes Gas & Oil Company, Skelly Oil Company, Kerr-McGee Corporation, Cities Service Oil Co., Ashland Oil, Inc., Juniper Oil Corporation, and certain of their subsidiaries and

*appeal, therefore, the allegations of Occidental's complaint must be taken as true.*

The motion for summary judgment was based on five grounds. The district court rejected four of these grounds, but granted summary judgment on the theory that the act of state doctrine prevented the court from reaching the merits of Occidental's claim. The district court refused to apply the provisions of 22 U.S.C. §2370(e)(2) ("the Hickenlooper Amendment"), which precludes application of the act of state doctrine in a case involving a claim based upon a confiscation in violation of international law.

The court of appeals, after hearing oral argument, asked the Department of Justice to file an amicus brief. The Department, in its brief, disagreed with the holding of the district court that the act of state doctrine would foreclose a determination of the validity of Occidental's concession. But the Department argued that Occidental's claim should nevertheless be dismissed, on the theory that a determination of the sovereignty of Umm at the time the concession was granted would present a nonjusticiable political question. This was a new argument, never before made.

Annexed to the Department's brief was a letter from the Legal Adviser to the State Department arguing that regardless of which theory was adopted, the court should not hear the case. The court of appeals yielded to this suggestion, abdicated its judicial function, and declined jurisdiction.

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affiliates intervened as claimants to the seized cargo. Civil Action No. 74-1192 ("Lykavitos") and Civil Action No. 75-0033 ("Anglo-Maersk") were filed in the Fourteenth Judicial District Court for the Parish of Calcasieu, as sequestration proceedings under Article 3501 *et seq.* of the Louisiana Code of Civil Procedure. The defendants removed both cases to the United States District Court for the Western District of Louisiana, on the basis of diversity of citizenship. The three cases were then consolidated.



## REASONS FOR GRANTING THE WRIT

### I.

**The decision of the court of appeals undermines the rule of law in international affairs, offends the constitutional mandate of an independent judiciary and denies due process of law to parties relying on foreign boundaries determined by the United States.**

The sole basis for the court of appeals' dismissal of Occidental's action was that it allegedly would have required resolution of a non-justiciable territorial dispute between Iran and Sharjah as to which of them owned the island of Abu Musa in 1969.[5a] This dispute, however, could not affect Occidental's claim. No matter who owned Abu Musa, under the law of the 3-mile limit to the territorial seas of nations, Occidental's concession site was clearly outside of that 3-mile territorial water limit. Thus the court of appeals' mistaken notion that the ownership of Abu Musa affected petitioner's claim, gave rise to the court applying the "political question" theory while in fact no such question existed in the case herein. In arriving at its decision, the court of appeals ignored the 3-mile limit recognized by the United States and substituted in its place a blind adherence to the transitory pleasure of the State Department as expressed in a letter from the Department's Legal Adviser.

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[5a] The court of appeals said:

> [I]n order to resolve appellant's right to possess the oil, we would have to resolve the dispute over Abu Musa. The resolution of a territorial dispute between sovereigns, however, is a political question which we are powerless to decide.

App. A. at p. A-11; 577 F. 2d at 1203; see also the court of appeals' footnote 7:

> . . . a determination of sovereignty over Abu Musa is necessary to the ultimate resolution of the right to oil in this case. This question, however, we hold to be a political question and therefore non-justiciable.

App. A. at p. A-8, fn.7; 577 F. 2d at 1201, fn.7.

**A. The Decision of the Court of Appeals Undermines the Rule of Law in International Affairs.**

**1. *The three-mile limit proclaimed by the Executive Branch has the force of law and is binding upon the courts.***

"The United States has been committed to the three-mile limit from the early days of its existence." Restatement (Second) of Foreign Relations Law, note to §15, at 40 (ALI 1965). Through its Executive Branch, the United States has consistently maintained that the three-mile breadth of the territorial sea is part of the substantive "law of nations" which "no nation may legally extend or enlarge by unilateral action." Foreign Relations of the United States, 1935, v. I, at 919 (State Dept. 1953). The United States has repeatedly proclaimed to the world that this substantive international law can be amended only by treaty; absent such a treaty, the United States does not recognize claims of territorial sovereignty seaward of three miles. Department of State Press Release 64, Feb. 25, 1970. The United States firmly maintains that any change in the law of the three-mile limit "is conditional on a satisfactory overall treaty." Department of State Bulletin, v. LXXI, no. 1832, at 233 (Aug. 5, 1974). No such treaty has been made.

In an effort to foster the rule of law in international affairs, the United States has sent notes of diplomatic protest to foreign governments whenever they have sought to extend their territorial seas through unilateral action. *See, e.g.,* United States note to Saudi Arabia, Foreign Relations of the United States, 1949, v. VI, at 157-60 (State Dept. 1977). In particular, with respect to Iran and Sharjah, the United States has declared illegal their attempts to



extend their territorial seas beyond three miles. In both cases, the United States expressly reserved the rights of American nationals (thus including Occidental) in international waters beyond three miles.

When *Iran* first attempted to extend its territorial sea, the United States protested as follows:

> The Government of the United States cannot recognize as valid the legislation under reference in so far as it purports to extend the dominion of Persia over the sea beyond three miles from its coast, and it is impelled therefore, to make full reservation of all its rights and the rights of its nationals.
>
> Foreign Relations of the United States, 1935, at 919.

Similarly, when *Sharjah* purported to extend its territorial sea to twelve miles around Abu Musa in 1970, the United States proclaimed that it "reserves its rights and those of its nationals in all areas . . . seaward of the traditional 3-mile limit." State Department Airgram to United States Embassy, London, dated July 22, 1970.[6]

Thus, the United States through its Executive Branch clearly refused recognition of Iran's and Sharjah's claims of territorial jurisdiction beyond three miles from the coast. This determination by the Executive is binding upon the courts. "[W]hen the Executive branch of the government, which is charged with our foreign relations, shall in its correspondence assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department." *Williams* v. *Suffolk Insurance Co.*,

[6] This protest by the United States was addressed to the same fraudulent backdated decree under which Buttes claims title to the Occidental oil.

38 U.S. (13 Pet.) 414, 420 (1939). *See also United States* v. *California*, 332 U.S. 19, 33-34 (1947); *Guarantee Trust Co. of New York* v. *United States*, 304 U.S. 126, 138 (1937); *Jones* v. *United States*, 137 U.S. 202 (1890). "A policy of non-recognition when demonstrated by the Executive must be deemed to be as affirmative and positive in effect as a policy of recognition." *The Maret*, 145 F.2d 431, 442 (3d Cir. 1944).

***2. The letter from the State Department on which the court of appeals relied does not profess to change the law of the three-mile limit.***

The letter from the Legal Adviser of the State Department relied upon by the court of appeals did not purport to change the law of the three-mile limit. It merely suggested that the court ought not to decide this case.

Therefore, the Legal Adviser's letter was just that, advisory, and could not and did not change the officially expressed position taken by the United States Government over and over again in its international relations that it adheres to the three-mile territorial water limit.

***3. The court of appeals erroneously declined jurisdiction because of its mistaken view that it had to determine the dispute between Iran and Sharjah over Abu Musa; this dispute is irrelevant to Occidental's claim.***

Occidental's oil find was located nine miles seaward of the island of Abu Musa and thus well outside the island's three-mile territorial sea, as recognized by our government. Occidental's grantor, Umm, had sole jurisdiction over that area for the exploitation of oil under the 1964 agreement executed through British auspices. App. A, at pp. A-3, 4; 577 F.2d at 1199. This agreement was concluded pursuant to Article 6, §2 of the 1958 Convention on the Continental Shelf of which the United States is a signatory. 15 U.S.T. 471, TIAS 5578.[7]



The sole basis for Iran's adverse claim to Occidental's oil find was the assertion that Abu Musa was an Iranian island, and that the island's territorial sea extended twelve miles from its coast under a unilateral Iranian decree. Similarly, Sharjah's sole basis for claiming Occidental's drilling site was that Abu Musa belonged to Sharjah and had a territorial sea of twelve miles under Sharjah's unilateral, secret, "unpublished" decree that was revealed in March 1970. Buttes itself, as late as 1972, cited as the sole basis of its alleged title the rights of Iran and Sharjah to the "entire 12-mile area around the island." Buttes Press Release of October 25, 1972.[8]

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[7] In addition to its other errors, the refusal of the court of appeals to take jurisdiction was a refusal to apply and interpret a treaty of the United States. "The judicial power shall extend to all cases . . . arising under . . . treaties . . . ." U. S. Const., Art. III, § 2. The 1958 Convention on the Continental Shelf was ratified by the United States and proclaimed by the President as taking effect as of June 10, 1964. 15 U.S.T. 471, TIAS 5578; 499 U.N.T.S. 311. The court of appeals erred when it held that "no manageable law exists to resolve disputed continental ownership." 577 Fed. 2d 1205; App. A. pp. A-15, 17. On the contrary, a treaty of the United States provided a body of law which the court was required to interpret and apply. It was the duty of the court, if necessary, to make that law "manageable" through the ordinary process of judicial construction.

[8] Since the three-mile limit is a binding rule of law, American courts must hold invalid the adverse claims of Iran and Sharjah to Occidental's drilling site. To overcome this legal barrier, Buttes for the first time on appeal raised the novel contention that the tiny island of Abu Musa possesses a continental shelf of its own extending beyond the limits of its territorial waters. But neither Iran nor Sharjah has ever claimed an independent continental shelf for Abu Musa. Buttes lacks the standing and

The court of appeals was wrong in believing that it would have to decide the adverse claims of Sharjah and Iran to the island of Abu Musa. It does not matter one whit whether Iran or Sharjah was right in its claim to Abu Musa. In either event, Occidental's concession stands unaffected because it is outside the three-mile limit of Abu Musa. To hold otherwise would do violence to the official position of the United States Government.

Therefore, contrary to the view of the court of appeals, this case does not present embarrassing, unmanageable or even difficult issues. It merely requires the court to apply the law of the three-mile limit adopted by our Executive Branch.

#### 4. *This Court's policy of fostering a rule of law in international affairs is undermined by the decision below.*

In *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 764 (1972), Justice Brennan, writing for four members of this Court,[9] repeatedly appealed for a judicial policy which would promote the rule of law in international affairs. *Id.,* at 778; 793; 794. A "rule of law" exists to the extent that conduct is guided by general principles rather

capacity to assert sovereign rights unclaimed by the sovereigns themselves. Moreover, we ask this Court to take judicial notice of the 50-odd tiny islands similar to Abu Musa that are scattered throughout the Persian Gulf. To attribute independent continental shelves to these islands would make chaos of the present division of offshore mineral rights, and would come as a rude shock to the coastal states of the Gulf, including Iran, Sharjah, and Umm.

[9] Brennan, Stewart, Marshall and Blackmun, JJ. Though technically a dissent, Justice Brennan's opinion in fact represented the plurality of a Court divided 3-1-1-4. The remaining five justices disagreed with the dissenters on other points, but their opinions show that they share the dissenters' concern for a rule of law in the international sphere.



than momentary expediency. When the subject matter before any court extends into the international arena, the rule of law is advanced or retarded by the way the court exercises its jurisdiction and by the rules of decision it applies.

In this case, the court of appeals refused to give effect to the law of the three-mile limit which the United States has steadfastly proclaimed for nearly two centuries in its defense of the international rule of law. Instead, the Court's decision was controlled by a desire to avoid judicial proceedings which might embarrass the State Department at a given moment in the ever-changing configuration of foreign powers. App. A, at pp. A-14, 15; 577 F.2d at 1204. The result is that a momentary preference of the State Department has prevailed in our courts against a principle of law.

A government department charged with diplomatic functions may find it desirable in a turbulent world to yield from day to day to special pressures. The courts, however, have a different mission. The judicial department must uphold the rule of law.

### B. The Decision of the Court of Appeals Offends the Constitutional Mandate of an Independent Judiciary.

In *First National City Bank, supra,* six members of this Court denied legal effect to the so-called "Bernstein letters." These were letters from the Legal Adviser of the State Department which professed to authorize the courts to inquire into the validity of foreign acts of state which otherwise would have been presumed valid under the act of state doctrine. See *Bernstein* v. *N.V. Nederlandsche-Amerikaansche,* 210 F.2d 375 (2d Cir. 1954).

Prominent among the reasons for this Court's rejection of the Bernstein letters was their interference in the judi-

cial process. "I would be uncomfortable with a doctrine which would require the judiciary to receive permission before invoking its jurisdiction. Such a notion, in the name of separation of powers, seems to me to conflict with that very doctrine." *First National City Bank* v. *Banco de Cuba,* 406 U.S. at 773 (Powell, J., concurring). In the same case, Justice Douglas said the Bernstein letters tended to make this Court "a mere errand boy for the Executive Branch, which may choose to pick some people's chestnuts from the fire but not others." *Id.* at 773. Similarly, Justice Brennan, joined by Justices Stewart, Marshall and Blackmun, said that the Bernstein letters "would require us to abdicate our judicial responsibility . . . ." *Id.* at 778. In a later case, Justice Marshall, noting this Court's disapproval of the Bernstein letters, said that "the task of defining the role of the Judiciary is for this Court, not the Executive Branch." *Alfred Dunhill of London, Inc.* v. *Republic of Cuba,* 425 U.S. 682, 724-5 (1976) (dissenting opinion joined by Brennan, Stewart and Blackmun, JJ.).

The instant case would bring before this Court for the first time the question of the validity of an "inverse Bernstein letter," *i.e.,* a letter from the Legal Adviser which urges the courts to *decline* jurisdiction of a case between two private litigants, both American nationals, which otherwise the court would have to decide. Inverse Bernstein letters offend the same constitutional principles as the disavowed Bernstein letters.

It was not law, but a letter, that the court of appeals felt compelled it to refuse jurisdiction. The court said, "[w]e are persuaded that a judicial determination would reflect a lack of respect for the executive branch, particularly the State Department. . . . A decision in this case, the State Department warns, would seriously impinge on executive



neutrality. *Therefore,* we are convinced that the issue of sovereignty over disputed territory is a political question. . . . " App. A, at pp. A-14, 15; 577 F.2d at 1204 (emphasis added).

The very formulation of this sentence which reveals the *non sequitur* expressed in the word "Therefore" demonstrates that the court of appeals resorted to the political question theory to comply with the State Department's "advice" rather than because it was convinced that there was such a question here. In short, the law was artificially accommodated to another branch of government.

The Executive cannot by mere suggestion change a cognizable claim into a nonjusticiable political question. Moreover, it is a dangerous error when a court permits "respect for the State Department" to control whether the door to the courtroom is open or locked to a litigant. The issue of the existence of a "case or controversy" is a *constitutional* question entrusted to the courts, and not to the State Department.

### C. The Refusal of the Court of Appeals to Take Jurisdiction Denies Due Process of Law to Parties Relying on Foreign Borders Determined by the United States.

Occidental had the right to rely on the law of the three-mile limit. To the extent that the Executive makes and interprets international law, it must do so within the strictures of the Fifth Amendment. A law, once made, remains in force until repealed; the Executive cannot turn it on and off at will. Nor can a party whose rights have been reserved under a principle of law be deprived of the law's protection because the facts of his case displease a governmental department. Due process abhors any doctrine

whereby "similarly situated litigants would not be likely to receive even-handed treatment." *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. at 793 (Brennan, J., dissenting).

## II.

**Even if the law of the three-mile limit were not dispositive, this Court would still be required to decide this case; otherwise, the litigants would be relegated to self-help.**

The decision of the court of appeals in this case is the only reported decision in American law holding that a court may not decide a case involving the private rights of private parties to property before the court, merely because the adjudication of those private rights touches upon an issue of sovereignty or boundaries. Nor is there any other reported decision holding that if the Executive Branch fails or refuses to make a determination with respect to sovereignty or boundaries, a court may not make such a determination in the course of adjudicating private rights. In its *amicus* brief filed in the court of appeals, the Department of Justice conceded, at page 7, "we have uncovered no case in which the Supreme Court has specifically held that cases involving boundary disputes raise nonjusticiable political questions".[10]

There is one case in which this Court, by way of dictum, has specifically addressed this issue. *Williams* v. *Suffolk*

[10] Even the district court below, though it dismissed under the act of state doctrine, recognized that there is no "unassailable rule of law . . . that a United States court cannot decide a case involving the private rights of private parties to property if the adjudication requires a collateral determination with respect to boundaries." 396 F.Supp. at 468.



*Insurance Company,* 38 U.S. (13 Pet.) 414 (1839). The *Williams* case involved the legality of the seizure of an American seal fishing vessel by the Government of Buenos Aires, and required a determination of sovereignty over the Falkland Islands. This Court made it quite clear that, in the absence of a determination by our executive or legislative branch, the issue of sovereignty over foreign territory is "an open question", into which a court may inquire. The Court went on to hold that it was "saved from this inquiry" because the issue of sovereignty over the islands had been resolved by our Executive. 38 U.S. (Pet.) at 419.[11]

The fact that primary conduct of foreign relations is entrusted to the Executive Branch is no obstacle to the power of an American court to decide a collateral issue of boundaries. If the Executive has made a substantive determination of sovereignty, the court will ordinarily respect that position. If the position of the Executive cannot be ascertained, however, then the Court is bound to decide the case independently.

In *Baker* v. *Carr,* 369 U.S. 180 (1962), this Court reviewed the status of the political question doctrine, including the applicability of the doctrine to cases involving foreign relations. 369 U.S. at 211-213. The Court pointed out that "it is wrong to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance". 369 U.S. at 211. The opinion in *Baker* v. *Carr* draws a distinction between cases in which the Executive has made a determination, and cases in which there has been "no conclusive governmental action", and suggests that the judiciary may make its own determination "in the

[11] See also *Foster & Elam* v. *Neilson,* 27 U.S. (2 Pet.) 253, 307 (1829). ("If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous."); *De la Croix* v. *Chamberlain,* 25 U.S. (12 Wheat.) 599 (1827).

absence of recognizedly authoritative executive declaration". 369 U.S. at 213. With respect to issues of foreign sovereignty in particular, the Court stated merely that "the judiciary *ordinarily* follows the executive as to which nation has sovereignty over disputed territory", 369 U.S. at 212 (emphasis added).

In the present case, the court of appeals has abandoned this Court's careful statement in *Baker* v. *Carr* in favor of a sweeping rule of nonjusticiability that would prevent an American court from reaching any decision at all in a case that touches upon an issue of foreign boundaries, past or present, if the Executive has refrained from taking a position:

> Just as the judiciary will follow an executive determination as to which nation has sovereignty over a disputed area [citation], so must the judiciary refuse to decide the dispute in the absence of executive action because of that absence of direction.
>
> App. A, at pp. 13, 14; 577 F.2d at 1203-04.

This holding of the court of appeals is erroneous. The political question doctrine, where applicable, requires a court to decide the merits of a case by deferring to an executive or congressional position. The doctrine embraced by the court of appeals is something very different, and would require the Court to decline to decide the merits by deferring to an executive *non*position. The political question doctrine does not, and should not, encompass this rule of nondecision.[12]

[12] The court of appeals also disregards the distinction between a determination of present sovereignty and a determination of former sovereignty. Occidental does not assert that Umm is now sovereign over the valuable portion of Occidental's concession area, but merely that Umm was formerly sovereign on November 18, 1969, when the concession was granted. It is a central element of Occidental's theory that Umm's sovereignty was terminated by annexation at the end of 1971, and that Sharjah and Iran assumed sovereignty thereafter. The relief that Occidental seeks—recovery of the oil extracted from its confiscated concession—would not, directly or indirectly, challenge the present sovereignty of Iran or Sharjah over the confiscated concession area, or any of their present boundary lines.



The decision of the court of appeals misapplies the language of *Baker* v. *Carr* and conflicts with clear expressions of this Court in earlier decisions. The court of appeals abdicated its duty to decide the rights of the litigants in this case, in deference to a mistaken notion of the separation of powers.

The ruling of the court of appeals creates a decisional vacuum, in which the claims of the parties can never be adjudicated, regardless of merit. The result is a form of anarchy, in which the victor may keep his spoils, free from the rule of law. The doctrine of nondecision, if allowed to stand, would put a premium on raw power and self-help. Under this doctrine, if a victim of a confiscation would piratically seize a cargo on the high seas and bring it into the United States, the contrary claimant would be foreclosed from any remedy. The "pirate" would be immune from suit and would then prevail, not on the merits of his claim, but merely because he would be the defendant, and not the plaintiff.

The decision below raises important issues relating to the role of the courts and the relationship among branches of government. These issues warrant the attention of this Court on review.

## III.

**The issue in this case which the court of appeals denominated a political question is indistinguishable from an act of state issue and is therefore controlled by the Hickenlooper Amendment.**

Congress enacted the Hickenlooper Amendment in 1964 for the express purpose of affording relief to victims of illegal foreign confiscations who had previously been denied access to our courts. The amendment provides:

> "*Notwithstanding any other provision of law,* no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right of property is asserted by any party • • • based upon • • • a confiscation or other taking • • • by an act of state in violation of the principles of international law • • •, 22 U.S.C. §2370(e)(2). (emphasis supplied)

The Hickenlooper Amendment was designed to alter the role of the United States as a "thieves market" where the confiscator was immune from suit by the victim. 110 Cong. Rec. 18936, 19555 (1964):

> "It insures that *however the case may arise or the act of state doctrine be invoked,* a party who had suffered an expropriation in violation [of international law] may bring suit to assert his claim to the expropriated property if there is an attempt to market it in the United States • • •" (*Ibid.,* page 23680). (Emphasis supplied).



In the present case, the district court dismissed on the ground of the act of state doctrine, and refused to apply the Hickenlooper Amendment. The court of appeals purported to circumvent the Hickenlooper Amendment entirely by sustaining the dismissal not on the act of state doctrine, but on what it called a "slightly different ground"—the notion that the case presents a nonjusticiable political question. App. A, at p. A-1; 577 F.2d at 1198.

The reasons the court of appeals used in holding the case nonjusticiable under the political question doctrine are identical to the reasons that have been expressed from time to time to justify the act of state doctrine—imagined sensitivity to foreign relations or difficulty of the issues, unmanageability, regard for the separation of powers, avoidance of embarrassment to the Executive Branch. It was precisely these contentions that Congress rejected when it enacted the Hickenlooper Amendment.

Under Hickenlooper, the courts are required to assume jurisdiction over all cases involving illegal confiscations of property which is later shipped into the United States regardless of the issues involved. The courts have no discretion under the statute. The directions of Congress to hear and determine the merits of such cases are clear and unconditional, and may not be avoided by the judiciary through abstention or otherwise.

The district court refused to apply the Hickenlooper Amendment. The court of appeals questioned its constitutionality. Hickenlooper is constitutional and it is clearly applicable to this case. *Banco Nacional de Cuba* v. *Farr,* 243 F. Supp. 957 (S.D.N.Y. 1965), aff'd 383 F.2d 166 (2 Cir.), *cert. denied* 390 U.S. 956, *reh. denied* 390 U.S. 1037 (1968).

The fact that every confiscation of property in violation of international law involves a political question does not render the matter nonjusticiable, nor does it foreclose the court from inquiring into its legality under Hickenlooper.

In the *Farr* case, the Hickenlooper Amendment was challenged on the ground that it represented an impermissible encroachment upon the power of the President and Executive Branch over foreign relations in violation of the doctrine of separation of powers. This is the same ground noted by the court below in support of its decision.

In upholding the validity of Hickenlooper, the district court in the *Farr* case held that the statute related to a subject "in which Congress had an interest, and in respect to which it could give direction" (243 F.Supp. at 972, 973). On appeal, the court of appeals for the Second Circuit confirmed the constitutionality of Hickenlooper. It held that "the act of state doctrine • • • was not constitutionally compelled", and rejected the notion that illegal confiscation by foreign states "presented a non-justiciable political question" beyond the court's power to adjudicate under Hickenlooper (383 F.2d at 180-1). This holding is entirely in accord with the decisions of this Court.

In *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964) this Court held that the act of state doctrine is a "principle of decision • • • compelled by neither international law nor the Constitution" and that said doctrine "does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state" (376 U.S. at 423, 427). Similarly, in *First National City Bank,* this Court held that the act of state doctrine was "judicially created to effectuate general notions of comity among • • • the respective branches of the Federal Government", and did not have "its roots • • • in the Constitution" (406 U.S. at 762, 765).



In the *Farr* case, this Court twice denied certiorari. On each occasion, it refused to review the holdings of the Court of Appeals for the Second Circuit that the act of state doctrine was not constitutionally compelled, and that the judiciary was free to inquire into any act of confiscation under Hickenlooper even though the underlying issue of any such inquiry involved a political question.

In *Sabbatino,* this Court held that the validity of a foreign act of state in certain circumstances is a "political question" not cognizable in our courts. The purpose of the Hickenlooper Amendment was to reverse this holding by directing the courts to assume jurisdiction over these "political questions" in determining the merits of the controversy. Thus, whether the case presents a political question or an act of a foreign state, in neither event is the court precluded from making a merit determination under the Hickenlooper Amendment in a case involving the unlawful taking of property by a foreign power in violation of international law.

In declining jurisdiction herein, the court of appeals repudiated the very purpose of Hickenlooper. In refusing to determine the merits of the unlawful confiscation, the court has rejected the statutory command of Congress. In dismissing the action, the court of appeals has left the victim of the illegal confiscation without a judicial remedy in violation of the statute. Unless the decision below is vacated by this Court, the Hickenlooper Amendment will be devoid of all meaning, and will be totally ineffective in preventing the United States from again becoming a "thieves market" for the disposal of our citizens' property illegally obtained through confiscation.

The importance of the issue presented by this case goes far beyond the private rights of the litigants, and deals

essentially with the rights of *all* victims of confiscation to seek legal redress under a federal statute that was enacted for that very purpose. The case presents a question of first impression under a statute that has not been construed by this Court since its enactment, and therefore warrants this Court's review. *American Federation of Musicians* v. *Wittstein*, 379 U.S. 171, 175 (1964); *United States* v. *Ruzicka*, 329 U.S. 287, 288 (1946).

## IV.

**The refusal of the court of appeals to hear this case offends the strong Congressional policy favoring judicial determination of the property claims of American victims of foreign confiscations.**

Even if the Hickenlooper Amendment were to be so narrowly construed as to control only those issues explicitly denominated as acts of state, the statute nevertheless embodies a strong Congressional policy that the victims of foreign confiscation should not be left helpless but should have their day in court.

Even before Hickenlooper, it was settled law that in matters involving political questions, "it is wrong to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance". *Baker* v. *Carr*, 369 U.S. 180, 211 (1962).

In *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. at 790, a plurality of judges of this Court held that "the task of defining the contours of a *political question, such as the act of state doctrine,* is exclusively the function of this Court", citing *Baker* v. *Carr, supra* (emphasis added). On the facts of this case, this Court, in "defining the contours", should give due regard to the Hickenlooper Amendment and to the strong policy of justiciability that it embodies. The policy of the amendment dictates that when an American citizen comes into an American court seeking to recover illegally confiscated property, the American court may no longer say to that citizen, (whether under the act of state doctrine or on a "slightly different ground"), "However meritorious your claim, our hands are tied".



The trumpet call of justice sounded by the Congress should not have been disregarded by the court of appeals even if only a matter of discretion were involved.

Entirely apart from the mandate of Hickenlooper, there is a philosophical compulsion in its logic. It has a unique moral impact. In a world in which terror is not unknown in many parts of the globe, may a wrongdoer cloak himself in technical immunity? Should the courts of our land aid him in such dishonorable evasion?

The pronouncement of this Court will be awaited eagerly by constitutionalists as well as by hapless victims of predators.

## CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for discovery and a trial on the merits.

Respectfully submitted,

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# Appendices

# APPENDIX A

## Opinion of the Fifth Circuit

OCCIDENTAL OF UMM AL QAYWAYN, INC.,

*Plaintiff-Appellant-Cross Appellee,*

—v.—

A CERTAIN CARGO OF PETROLEUM LADEN ABOARD THE TANKER DAUNTLESS COLOCOTRONIS, etc., ET AL.,

*Defendants-Appellees-Cross Appellants.*

No. 75-3088.

United States Court of Appeals,
Fifth Circuit.

Aug. 9, 1978.

Before THORNBERRY, MORGAN and INGRAHAM, *Circuit Judges.*

LEWIS R. MORGAN, *Circuit Judge*:

In these conversion actions, consolidated on appeal, the federal court is asked for a decision we consider impossible. The immediate question is whether the district court erred in granting appellee's motion for summary judgment. The district court determined that it should refrain from deciding the issue on the merits, the rights to oil extracted from the Persian Gulf, because the decision would call into question the acts of foreign states. We dismiss on the slightly different ground that the question presented is political, being both constitutionally devolving on the

executive and judicially unmanageable, and therefore, not a "case or controversy" within Article III of the Constitution. On appellee's counterclaim to enjoin appellants from further litigation in this and other federally cognized jurisdictions, we reverse the district court and grant the injunction.

A thorough factual development is a necessary prerequisite to analysis.

A. Geography.

The scene for this political drama is the exotic Persian Gulf, once noted for the Arabian nights, now famous and important as a source of oil to light those nights. On the southern "lip" of the mouth of the Gulf lie the Trucial Sheikhdoms of Umm al Qaywayn (hereafter Umm), Sharjah, and Al Ajiman. Situated near the mouth of the Gulf, about 40 miles northwest of Umm, is the tiny island of Abu Musa. The island is also approximately 50 miles due south from Iran, the country with the largest contiguous border on the Gulf.

B. History, relatively ancient.

For almost a century, Great Britain had been the "protectorate" of the Trucial Sheikhdoms, including Umm and Sharjah. Pursuant to the treaty establishing this relationship, the United Kingdom was responsible for the Sheikhdoms' international relations, defense, and internal relations among the individual states. This protectorate jurisdiction included all the territories and territorial waters of the Sheikhdoms and territorial waters. As provided by the treaty, the protectorate ended in November 30, 1971.

During the course of this protectorate, a dispute over the sovereignty of Abu Musa had existed between Great Britain as agent of Sharjah, and Iran.[1] For example, the India Survey Map of 1897 represented the island in the colors of Persia (now Iran), as did the Viceroy's unofficial map of 1892. Later, in April of 1904, the dispute flared as the Persian government placed custom officials on the island and flew the Persian flag. This establishment of sovereignty was short-lived, however, and the evidence was quickly removed at the demand of the British government. Persia did not abandon its claim with this setback, however. In 1923, Persia reasserted its claim to Abu Musa by protesting the leasing, by Great Britain, of mineral rights to the island. In 1930, Great Britain and Persia discussed settlement of the dispute, but no accord was reached.



C. Modern History.

In the early 1960's, because of rising worldwide energy demands and the growth of offshore drilling technology, the Persian Gulf was becoming hot property. In 1964, perhaps as a response to this increased demand, Umm and Sharjah entered into an agreement, under the auspices of the British, establishing their territorial waters and continental shelf borders. This treaty not only established the territorial waters of the parties, but also established their respective continental shelf. The agreement was embodied in an admiralty map establishing the continental shelf of

[1] Appellant contends that the district court erred in permitting appellees to introduce evidence of a longstanding dispute between Iran and Sharjah over Abu Musa because of appellees' agreement to limit discovery on the issue. Even if the agreement could be deemed a stipulation the federal court is not bound by a factual stipulation that will impact on its jurisdiction. Just as the court will not be bound by the pleadings in collusive federal question cases, *Lord* v. *Veazie*, 8 How. 251, 12 L.Ed. 1067 (1850) and collusive diversity claims, *Caribbean Mills, Inc.* v. *Kramer*, 392 F.2d 387 (5th Cir. 1968), so would the court not be bound by stipulations on which the existence of a "case or controversy" might turn.

Umm as extending to the three-mile territorial waters of Abu Musa, recognized by the British as Sharjah's possession, giving Umm 37 miles of the intervening continental shelf.

On November 18, 1969, appellant and the Ruler of Umm contracted that appellant would have the exclusive right to explore for and extract oil within Umm, its continental shelf, and its territorial waters for forty years. The boundaries to this concession conformed to those established for Umm by the treaty with Sharjah of 1964. The British Foreign Office ratified the concession agreement, as a condition precedent required under the protectorate. A month later, Sharjah granted Buttes Oil Company, appellees' predecessor, a similar concession to extract oil from its territories. The boundaries of the Buttes concession also conformed to the 1964 treaty and the agreement was subsequently ratified by the British Foreign Office.

No conflict existed between the parties until March 25, 1970, when Buttes Oil and Gas Company notified the British representative to the Sheikhdoms that Buttes intended to drill for oil within the Occidental concession area, approximately 31 miles from Umm, 9 miles east of Abu Musa. Indeed, the drilling location coincided with that suggested by Occidental's exploratory testing. Also at that time, the British agent was made aware of a Sharjah decree purporting to extend its territorial waters from three to twelve miles, including those of Abu Musa. Of course, this unilateral decree did substantial violence to the 1964 treaty, and the British Foreign Office rejected the subsequent amendment of Buttes' concession agreement with Sharjah to reflect the extension. Additionally, the Buttes' request to drill was also denied by the British Government. Although the Foreign Office considered the unilateral action in violation of international law, it strove to bring about



an amicable solution. Although Umm and Sharjah were persuaded by the United Kingdom to mediate their claims, mediation failed when Umm refused to abide by the mediator's decision.

Meanwhile, to further muddy the political waters, in a letter dated May 28, 1970, appellant was informed by the National Iranian Oil Company that it should desist all drilling operations in its concession area. The stated basis for this demand was that because Abu Musa was an Iranian possession, and because Iran recognizes twelve mile territorial limits, Occidental concession was within Iran's territories. Faced with the probability of intervention by Iran, the British Government maintained the suspension of all drilling in the disputed area.

On November 26, 1971, the dispute between Iran and Sharjah over Abu Musa was settled, at least practically and prospectively.[2] This agreement between Iran and Sharjah occurred only four days prior to the expiration of the British protectorate over the Trucial Sheikhdoms. Pursuant to this agreement, the island was essentially divided, and Sharjah's concession with Buttes was ratified and the future royalties were split between the sovereigns. On November 30, 1971, Iranian troops landed on Abu Musa, and the Iranian navy began patrolling the waters of the island. Shorn of the protection of the British Government, Umm had no means to protect its territories as defined under the 1964 agreement, and Occidental was without protection as well. Buttes began drilling immediately with salutory results. Buttes later sold interests in the oil to appellees, Ashland Oil Inc., Kerr McGee Corp., Skelly Oil Company, and Cities Services Company. Each was put

[2] By the terms of this partition agreement neither Sharjah nor Iran abandoned its claim to Abu Musa in favor of the other.

on notice of Occidental's claim. In 1974, appellants began extracting oil from the disputed concession area, and among the shipments of this oil to the United States were those aboard the "Dauntless Colocotronis," "Lykavitos," and the "Anglo-Maersk," which were seized in proceedings.[3]

At least among the sovereigns, the rights to the royalties from the area were definitely settled. Some time after the Iranian occupation of Abu Musa, the Rulers of Umm and Sharjah agreed to divide royalties payable to Sharjah with Umm receiving thirty percent. Appellant suffered its final political reverse when in June of 1973, the Ruler of Umm terminated Occidental's concession for failure to pay rentals due under the contract.

D. History of the Case.

Prior to analysis of the case, a brief legal history of the dispute is helpful. The appellants and appellees' predecessors have once before litigated the underlying basis of their dispute. In *Occidental Petroleum Corporation* v. *Buttes Gas and Oil Co.*, 331 F.Supp. 92 (C.D.Cal.1971), aff'd, 461 F.2d 1261 (9th Cir. 1972), cert. denied, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221, appellants brought an antitrust action against Buttes, and Clayco Petroleum Company and certain officers of the corporations alleging a conspiracy among the defendants to oust appellant from its concession. This action was filed more than eight months prior to the Iranian occupation of Abu Musa, and years prior to the exportation of oil. The district court held, and the court of appeals affirmed, that the court was

[3] Immediately after the seizures, the oil is released to the appellees as provided by agreement. The appellees have not been required to post bond.



precluded from piercing the veil of sovereign action by the "act of state" doctrine[4] and granted summary judgment. Although appellee contends that the Ninth Circuit case is *res judicata* for the case *sub judice*, we need not decide the question because we hold that we lack jurisdiction.

Actions No. 74-1192 and No. 75-0033 were brought as diversity actions.[5] Action No. 74-868 was brought as an *in rem* action in admiralty. The district court granted appellee's motion for summary judgment in the diversity actions holding that because the actions of foreign sovereigns were called into dispute, the "act of state doctrine" required the court to refrain from deciding on the merits. *See Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). Moreover, the district court concluded that, under the circumstances, the Hickenlooper Amendment, 22 U.S.C.A. 2370(e)(2) (Cum. 1977), did not

[4] In 1897 the Supreme Court formulated what has become known as the "act of state" doctrine. The Court held that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Underhill* v. *Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897). This is not an abstention doctrine, but rather resembles a conflicts of laws principle. See *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 310, 38 S.Ct. 312, 62 L.Ed. 733 (1917). Although in one decision the Court stated both that the doctrine had constitutional underpinnings and the doctrine was not compelled by the Constitution, the better view would be that the doctrine is constitutionally compelled by the concept of separation of powers and placement of plenary foreign relations powers in the executive. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed. 2d 804 (1964).

[5] The civil actions were first brought in the Fourteenth Judicial District Court for the Parish of Calcasieu as sequestration proceedings pursuant to Article 3501 of the Louisiana Code of Civil Procedure. The appellants, removed to the federal district court of the Western District of Louisiana, claim diversity of citizenship.

prevent such abstention.[6] The district court dismissed the admiralty action holding that admiralty jurisdiction was absent because if any conversion occurred, it occurred at the well-head not on the seas. Because we hold that no case or controversy exists, we dismiss all three claims for want of jurisdiction, but on the common ground that a resolution would involve a political question.[7]

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[6] In response to the refusal of the Supreme Court to pierce the sovereign veil in *Sabbatino*, Congress passed the so-called Hickenlooper Amendment designed to prevent such abstention. The amendment provides, in pertinent part:

> Notwithstanding any other provision of law, no court in the United States shall decline on the grounds of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

22 U.S.C.A. § 2370(e)(2) (Cum. 1977). It should be noted that if the act of state doctrine is constitutionally compelled, as was both suggested and negated in *Sabbatino*, the Hickenlooper Amendment would be ineffective. See note 4, *supra*.

[7] As will be developed *infra*, a determination of sovereignty over Abu Musa is necessary to the ultimate resolution of the right to the oil in this case. This question, however, we hold to be a political question and therefore non-justiciable. Note well that this question would also have to resolved under the "act of state" doctrine.



A political question clearly emerges under the proper analysis. Although, whether a political question is present and the court lacks jurisdiction are issues committed to federal law, we need to address such questions *only* if they would arise in the diversity action framework.[8] *See Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Therefore, we must analyze appellant's claim as it would be tried, to determine whether a political question will emerge.[9] Shorn of its factual complexity, appellants claim a tortious conversion of oil. Because this is a diversity case, we apply the law of the forum. Louisiana, to the claim. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Additionally, because the operative facts occurred outside of Louisiana, we must also apply Louisiana's conflicts principles to determine which forum's law to apply. *Klaxon* v. *Stentor Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Applying these principles, we find that to successfully maintain its tortious conversion action, appellant would have to establish its

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[8] We analyze the question with regard to the diversity action only because the procedure is more involved. The political question emerges directly under admiralty jurisdiction because we would immediately apply international law as a matter of federal law. See *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed. 2d 56, *reh. denied*, 366 U.S. 941, 81 S.St. 1657, 6 L.Ed.2d 852 (1961). As a matter of federal law the district court would then determine whether the conversion violated the principles of international law.

[9] Appellant complains that the court is unduly delving into the merits to determine the presence of a political question. Just as it is necessary to delve into the "merits" of a case to determine whether the claimant has sustained an injury in fact to determine standing, *United States ex rel. Chapman* v. *Federal Power Commission*, 345 U.S. 153, 156, 73 S.Ct. 609, 97 L.Ed. 918 (1953), so must we analyze the legal "merits" of the instant case in order to determine whether a case or controversy exists.

right to possess the oil at the time of conversion.[10] Appellant apparently contends that the conversion occurred when appellant was supplanted by Buttes through the intervention of Iran, sometime after November 30, 1971.[11] Because, as a matter of international law, one who receives an interest in land which is in dispute between sovereigns

[10] In *Importsales* v. *Lindeman*, 231 La. 663, 92 So.2d 574 (1957), the Louisiana Supreme Court stated that the essence of conversion is the wrongful deprivation of the claimant's possession, to which he is rightfully entitled. Thus, in order to successfully maintain a conversion action, appellant would have to show that at the time of conversion it was entitled to possession of the res. As a matter of conflicts, if this action did not involve acts of foreign states, a Louisiana court would apply the law of the forum in which the conversion occurred to determine whether appellant was entitled to possession. *See Matney* v. *Blue Ribbon Inc.*, 12 So.2d 249, 253 (La. App. 1942); *Quickkick* v. *Quickkick International*, 304 So.2d 402, 406 (La. App. 1974). Because appellee traces its title to the oil to acts of the sovereigns of Sharjah and Iran in supplanting appellant with Buttes, however, a court setting in Louisiana would follow the "act of state" doctrine and accept the act of the sovereign as a rule of decision. *Monte Blanco Real Estate Corp.* v. *Wolvin Line*, 147 La. 563, 85 So. 242 (1920). It is clear that the Louisiana Supreme Court intended that the act of state doctrine operate as a conflicts principle and that Louisiana courts will accept and apply as law the acts of foreign sovereigns. The Louisiana Supreme Court also made it abundantly clear that it considered the act of state doctrine mandated by federal law. The Hickenlooper Amendment, however, prevents *any* United States court from applying the *federal* act of state doctrine if the confiscation violated international law. A Louisiana court, therefore, would apply international law to determine whether the Hickenlooper Amendment is applicable. Because the Hickenlooper analysis is federal, however, the Louisiana court would be bound by the international law as developed by the Supreme Court in *Poole* v. *Fleeger*, 36 U.S. 185, 9 L.Ed. 680 (1837) and *Coffee* v. *Groover*, 123 U.S. 1, 8 S.Ct. 1, 31 L.Ed. 51 (1887).

[11] The explanation for appellant's ambiguity with regard to the conversion may be the mistaken conception that the Hickenlooper Amendment in some way provides a cause of action. At most, the amendment is a federal conflicts principle; at least, a mandate to the states to follow state law, not the federal "act of state" doctrine.



takes subject to the dispute, *Coffee* v. *Groover*, 123 U.S. 1, 29-30, 8 S.Ct. 1, 31 L.Ed. 51 (1887); *Poole* v. *Fleeger*, 36 U.S. 185, 9 L.Ed. 680 (1837),[12] appellant must necessarily develop Umm's right to undisputed possession of the portion of the continental shelf where the oil was extracted at the time the interest was passed, 1969. It is evident from the record, however, that the sovereignty, Abu Musa, and, derivatively, its continental shelf was in dispute between Iran and Sharjah (through Great Britain). Therefore, in order to resolve appellant's right to possess the oil, we would have to resolve the dispute over Abu Musa. The resolution of a territorial dispute between sovereigns, however, is a political question which we are powerless to decide.

Throughout the history of the federal judiciary, political questions have been held to be nonjusticiable and therefore not a "case or controversy" as defined by Article III. In *Ware* v. *Hylton*, 3 Dall. 199, 300, 1 L.Ed. 568 (1796), the Supreme Court recognized that in the realm of foreign relations policy considerations render issues incompetent for a decision by the court. In *Marbury* v. *Madison*, 1 Cranch 137, 164-166, 2 L.Ed. 60 (1803), Chief Justice Marshall acknowledged the existence of a class of cases which involve a "mere political act of the executive" and which

[12] It is arguable that the conversion did not occur until the oil was actually severed from the realty in 1974. At that time, however, the boundary disputed was settled among the sovereigns, at least practically. Application of *Coffee* and *Poole* would directly result in vesting title in the appellees. It is also arguable, however, that because Iran and Sharjah still refuse to recognize each other's claim, the dispute was not settled as a matter of international law. See note 2, *infra*. Therefore, we only use these cases for the proposition that under international law if a dispute exists at the time of taking, in the instant case, 1969, when the concession was granted by Umm, then appellant took subject to that dispute. As has been developed, *supra*, the sovereignty was disputed in 1969.

were placed by the Constitution in the hands of the executive. The Supreme Court therefore appreciated that the genesis of the political question is the constitutional separation and dispersement of powers among the branches of government. In *Coleman* v. *Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939), the Supreme Court clearly recognized that the political question doctrine partakes not only of the existence of separation of powers, but also of the limitation of the judiciary as a decisional body. The Court stated: "In determining whether a question falls within [the political question category], the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." The Court was merely admitting that they were not tribal wisemen dispensing divinely or theoretically inspired judgments, but were a court limited to the application of predetermined law.

In *Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Supreme Court extensively reviewed the history and evolution of the political question. As a result of this survey, the Court identified a number of basic characteristics or considerations relevant to the existence of a political question. The Court held that the inextricable presence of one or more of these factors will render the cas nonjusticiable under the Article III "case or controversy" requirement, and therefore, the Court would be without jurisdiction. In this most definitive pronouncement, the Court identified the following factors as relevant to the affirmative determination of the existence of a political question:

> (1) "a textually demonstrable commitment of the issue to a coordinate political department"



> (2) "a lack of judicially discoverable and manageable standards"
>
> (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"
>
> (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"
>
> (5) "an unusual need for unquestioning adherence to a political decision already made"
>
> (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question"

369 U.S. at 217, 82 S.Ct. at 710. In the instant case, nearly every one of the factors is present and the vitality of the political question in the arena of foreign relations is abundantly demonstrated.

The ownership of lands disputed by foreign sovereigns is a political question of foreign relations, the resolution or neutrality of which is committed to the executive branch by the Constitution. As has been demonstrated, to determine whether a tortious conversion has occurred, it is necessary to determine the sovereign ownership of the portion of the continental shelf from which the oil was extracted. Although sovereigns are not directly involved, a judicial pronouncement on the sovereignty of Iran or Sharjah would be unavoidable. Such a determination is constitutionally reserved to the executive branch, however. Just as the judiciary will follow an executive determination as to which nation has sovereignty over a disputed area, *United States* v. *Klintock*, 5 Wheat. 144, 149, 5 L.Ed.

55 (1820), so must the judiciary refuse to decide the dispute in the absence of executive action because of that absence of direction. That is, in the language of *Baker* v. *Carr, supra,* the question of sovereignty is committed to the executive branch by the Constitution, and decision of the issue is impossible in the absence of the executive policy decision. Additionally, we are persuaded that a judicial determination would reflect a lack of respect for the executive branch, particularly the State Department. Contained in the Government's amicus brief is a letter from the State Department[13] indicating the importance of

[13] In pertinent part the letter states:

> Your Division has asked for our views concerning certain aspects of the case of *Occidental of Umm Al Qaiwain* [sic] *Inc.* v. *A certain Cargo of Petroleum Laden Aboard the Tanker "Dauntless Colocotonic,"* [sic] *Etc., et al., C.A. 5, No. 75-3088.*
>
> It is our understanding that the disposition of this case would require a determination of the disputed boundary between Umm Al Qaiwain on the one hand and Sharjah and Iran on the other at the time Umm Al Qaiwain granted the concession in issue to Occidental. It is our view that it would be contrary to the foreign relations interests of the United States if our domestic courts were to adjudicate boundary controversies between third countries and in particular that controversy involved here.
>
> The extent of territorial sovereignty is a highly sensitive issue to foreign governments. Territorial disputes are generally considered of national significance and politically delicate. Even arrangements for the peaceful settlement of territorial differences are often a matter of continued sensitivity.
>
> These considerations are applicable to the question of Umm Al Qaiwain's sovereignty over the continental shelf surrounding Abu Musa at the time of the concession to Occidental and to the subsequent arrangements worked out among the affected states. For these reasons, the Department of State considers that it would be potentially harmful to the conduct of our foreign relations were a United States court to rule on the territorial issue involved in this case.
>
> We believe that the political sensitivity of territorial issues, the need for unquestionable U.S. neutrality and the harm to our foreign relations which may otherwise ensue, as well as the evidentiary and jurisprudential difficulties for a U.S. court to determine such issues, are compelling grounds for judicial abstention.
>
> We do not believe that this judicial self-restraint should turn on such analytical questions as whether the so-called Act of State doctrine which is traditionally limited to governmental actions within the territory of the respective state can apply to an exercise of disputed territorial jurisdiction. It rather follows from the general notion that national courts should not assume the function of arbiters of territorial conflicts between third powers even in the context of a dispute between private parties. As a result, we are of the view that the court should be encouraged to refrain from setting the extent of Umm Al Qaiwain's sovereign rights in the continental shelf between its coast and Abu Musa at the time of its grant of the concession to Occidental.



neutrality in the politically and economically sensitive Middle East.[14] A decision in this case, the State Department warns, would seriously impinge on executive neutrality. Therefore, we are convinced that the issue of sovereignty over disputed territory is a political question reserved to the executive branch.

The issue of sovereignty is political not only for its impact on the executive branch, but also because judicial or manageable standards are lacking for its determination. To decide the ownership of the concession area it would be necessary to decide (1) the sovereignty of Abu Musa, (2) the proper territorial water limit and (3) the proper allocation of continental shelf. A judicial resolution of the dispute over Abu Musa between Iran and Sharjah is clearly impossible. In their external relations, sovereigns

[14] In determining whether to abstain or dismiss because of conflicting executive interest, federal courts are becoming more amenable to receiving opinion by the executive branch. *See First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972); *Bernstein* v. *N. V. Nederlandsche-Amerikaansche,* 210 F.2d 375 (2d Cir. 1954). Although these are act of state doctrine cases, not political questions, it is nonetheless clear that whether the state department believes that judicial action would interfere with its foreign relations is germane to whether a court may decide actions involving foreign relations.

are bound by no law; they are like our ancestors before the recognition or imposition of the social contract. A prerequisite of law is a recognized superior authority whether delegated from below or imposed from above—where there is no recognized authority, there is no law. Because no law exists binding these sovereigns and allocating rights and liabilities, no method exists to *judicially* resolve their disagreements. The ownership of the island, and derivatively its waters, has long been the subject of dispute. Were we to resolve this dispute we would not only usurp the executive power, but also intrude the judicial power beyond its philosophical limits.

The international law of territorial waters and of the continental shelf would also be involved in determining Occidental's right to oil from the concession area. Although some standards have been developed for the delineation of territorial waters, these formulations leave unresolved the permissible seaward extent of territorial waters. *See* 4 Whiteman, Digest of International Law 94-137 (1965). Therefore, we would be in a judicial no-man's land were we to purport to decide the legality of Sharjah's unilateral extension of its territorial waters or Iran's twelve-mile limit. Moreover, the ownership of the concession area would depend upon the ownership of the continental shelf between Abu Musa and Umm.[15] Again, although some standards have been developed, these standards depend in part on the existence of agreement among

[15] According to Article I of the Convention on the Continental Shelf, the continental shelf begins at the termination of the territorial waters and extends "to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admit of the exploitation of natural resources . . . ." Thus, rights to the continental shelf of Abu Musa depend both upon the extension of territorial waters by Sharjah and the sovereignty over Abu Musa itself.



sovereigns. Because ownership of the continental shelf is derivative of the ownership of the unsubmerged land, the extent and ownership of Abu Musa's shelf is necessarily in dispute. No manageable law exists to resolve disputed continental shelf ownership, however. *See* Article VI, Convention on the Continental Shelf, 15 U.S.T. The nexus between the absence of manageable standards and the political question is quite evident. Resolution of disputed continental shelf can only occur by the political action of the sovereigns themselves.[16]

On cross-appeal, we are asked to review the decision of the district court refusing to grant cross-appellant's motion for an injunction against all pending and further litigation, both in state and federal courts. The result of the immediate imposition of this injunction would serve to deprive the appellant of its statutory remedy of seizing further shipments of oil. On the other hand, appellees have a right to a speedy determination of this issue to avoid endless seizures that may amount to a major nuisance if this action is not finally determined on appeal.[17] We there-

[16] The response to the appellant's plea for a day in court can be interpolated from *Ware* v. *Hylton, supra*. The Supreme Court suggested that anyone dismissed from the judicial remedy because of executive prerogative should, of course, seek recourse through the intervention of the executive. Because the president holds plenary power in foreign relations, however, the president is free to refuse. Should the president ever officially act on a political issue, we would be constitutionally bound to accept his act. Moreover, there is no law against executive advisory opinions. As an alternative, the executive could create administrative courts to handle all political cases, review to the Supreme Court limited to the existence of a political question.

[17] As of May 9, 1975, there were 58 suits pending involving the same set of facts; 23 in the Western District of Louisiana, 12 in the Eastern District, 3 in the Eastern District of Texas, 2 in the Virgin Islands, 17 in the Louisiana State Court, Calcaieu Parish, and one in Texas State Court, Jefferson County. At the time of appeal, approximately 120 such suits were pending.

fore grant the injunction in order to protect the appellee, and stay the injunction pending disposition by the Supreme Court, in order to protect the appellant and promote a speedy resolution of this problem.[18] Should the appellant fail to appeal this judgment, the stay shall expire with the time limit for filing the appeal.

DISMISSED in part, REVERSED in part.

[18] Although federal courts are normally precluded from enjoining state litigation, an injunction is proper "where necessary in aid of its jurisdiction or to protect or effectuate its judgments." 28 U.S.C.A. § 2283. Because we have held that, as a matter of federal law, a political question emerges we deem it necessary to enjoin state proceedings in order to effectuate our judgment that the issue is one committed to the executive. Such an injunction also is necessary to aid the jurisdiction of the Supreme Court to finally resolve the question of the existence of a political question.



## APPENDIX B

### Opinion of the District Court

OCCIDENTAL OF UMM AL QAYWAYN, INC.

—v.—

CITIES SERVICE OIL CO., et al.,
("Lykavitos").

OCCIDENTAL OF UMM AL QAYWAYN, INC.

—v.—

KERR-MCGEE CORPORATION
("Anglo-Maersk").

OCCIDENTAL OF UMM AL QAYWAYN, INC.

—v.—

A CERTAIN CARGO LADEN ABOARD DAUNTLESS COLOCOTRONIS.
Civ. A. Nos. 74-1192, 75-0033 and 74-868.

United States District Court,

W. D. Louisiana

Lake Charles Division.

July 8, 1975.

EDWIN F. HUNTER, JR., *Chief Judge:*

Plaintiff seeks to recover crude oil seized on board three tankers. The oil was extracted from the seabed of the Arabian Gulf at a point located nine miles off the coast of the Island of Abu Musa.

These consolidated cases represent only a small portion of the pending litigation arising out of the same set of facts. As of May 9, 1975, there were approximately 58 separate actions: 23 in the Western District of Louisiana, 12 in the Eastern District of Louisiana, 3 in the Eastern District of Texas, 2 in the Virgin Islands, 17 in the Calcasieu Parish, Louisiana State Court, and one in the Jefferson County, Texas State Court.

Buttes Gas & Oil Company and Occidental are holders of offshore oil concession agreements granted by two adjacent sheikdoms. Sharjah and Iran refused to recognize Occidental's concession and instead recognized the concession of Buttes, thus enabling Buttes to commence drilling operations and produce the oil. This action, plaintiff argues, is tantamount to a confiscation, and the Hickenlooper Amendment requires that we adjudicate the controversy.

Defendants originally filed a motion to dismiss, which motion, by the interaction of F.R.Civ.P. 12 and 56, has now been converted into a motion for summary judgment. Numerous authenticated documents and affidavits appear in the record.

Due to the many contradictory factual assertions, it is appropriate to synopsize the uncontested facts and to set out the most important of those contested. In 1970 plaintiff filed a federal cause of action under the Sherman Act and claimed a deprivation of the enjoyment of the



precise gas concession here involved. Buttes Gas & Oil Company, the major defendant in that suit, moved to dismiss. The motion was granted in a thorough and well-reasoned opinion on March 17, 1971. The decision was pegged on the basic proposition that the Act of State doctrine precluded further adjudication and that the exception to the doctrine contained in the Sabbatino Amendment (Hickenlooper) was by its terms extremely narrow and not applicable to the situation presented. *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F.Supp. 92, (C.D. Cal. 1971). The Court of Appeals for the Ninth Circuit affirmed at 461 F.2d 1261 (1972). The United States Supreme Court denied a writ of certiorari, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972).

There are two Trucial States, Sharjah and Umm Al Qaywayn, located on the southeastern end of the Persian Gulf. Forty nautical miles into the Gulf is an island named Abu Musa. At the northern end of the Gulf, approximately 50 nautical miles from Abu Musa, is the country of Iran.

In 1964 the Rulers of Umm and Sharjah allegedly entered into a treaty agreement establishing a seabed border agreement, pursuant to which the limit of the territorial waters of Abu Musa was three (3) nautical miles and the area beyond this three-mile limit was Umm Al Qaywayn's continental shelf.[1] Sharjah, by an unpublished decree of September 10, 1969, extended its territorial waters to a

[1] This agreement is in the form of unilateral declarations made by the Rulers of Sharjah and Umm Al Qaywayn. They do not mention the Continental Shelf, but plaintiff is confident that after full discovery and a trial on the merits that the Court would conclude that these declarations established the boundary of the Continental Shelf of Umm at the three nautical mile limit off the territorial waters of Abu Musa.

point 12 nautical miles off Abu Musa, a decree assertedly contrary to the 1964 treaty.[2]

On November 18, 1969, plaintiff obtained from the Ruler of Umm a concession granting it the exclusive right to explore for and extract oil underlying the territorial and offshore waters of Umm. Subsequent to plaintiff's obtention of its concession from Umm, Buttes was granted an oil and gas concession by Sharjah on December 29, 1969, encompassing the territorial waters of Sharjah, its islands, including Abu Musa, and the seabed and subsoil lying beneath those waters. Each concession agreement was approved by the British government. On April 7, 1970, Sharjah and Buttes executed an amendment to the original concession extending the concession area to 12 miles off Abu Musa's coast. Plaintiff asserts that although the British Foreign Office was not "taken in" by the backdated decree and concession amendment, it endeavored to settle amicably the respective Territorial Waters claims of Umm and Sharjah by requiring both plaintiff and Buttes to cease any drilling operations and to submit their demands to mediation.

In the meantime, Iran, acting through the National Iranian Oil Company, set forth its claim to Abu Musa, and enunciated a 12-mile Territorial Waters jurisdiction. Great Britain left the Persian Gulf on or about December 1, 1971. Immediately prior thereto Sharjah and Iran settled their dispute pursuant to an agreement which called for the joint possession of Abu Musa and the disputed area. The agreement reserved the title question to

[2] Plaintiff asserts, in effect, that this was a backdated fraudulent Territorial Waters Decree and should not be considered by the Court. The record does not contain a copy of the decree, but it has been alleged affirmatively in the plaintiff's petition (Complaint, paragraph 8).



the future. It called for a 50-50 split in any oil royalties. Iran also recognized the validity of the Sharjah lease concession agreement to Buttes. In April of 1972, Buttes commenced drilling operations in the disputed area (nine miles east of Abu Musa) and later entered into joint venture agreements with the other defendants and/or their subsidiaries. In June of 1973, before the oil in question was extracted from the disputed area, Umm—the source of Occidental's concession rights—terminated that concession agreement, allegedly because of Occidental's failure to pay monies required under the agreement. Under the auspices of Sharjah and Iran, Buttes began extracting oil from the contested area, storing it temporarily on the "Baraka 1" and then shipping it to the United States. In September of 1974 this oil began arriving in the United States.

Defendants argue that dismissal and/or summary judgment should be required on five independent grounds:

A. Application of res judicata doctrine;

B. Application of collateral estoppel doctrine;

C. The Act of States Doctrine precludes inquiry into the acts of foreign states called into question;

D. Resolution of the issues would require adjudication of a boundary dispute between foreign nations;

E. The absence of Sharjah, Iran and Umm Al Qaywayn, which are indispensable parties.

### Plaintiff's Basic Position

Occidental strenuously insists that defendants are complicating the simple, and that we must look through "these eristic maneuvers." In oral argument counsel stated:

"As surprising as it may sound, after the volume of briefs that have been filed, this is, in essence, a one issue law suit. The issue is: 'was Umm al Qaywayn a sovereign on November 18, 1969 when the concession was granted?'"

This presents an issue of fact that will require the Court's determination (Tr. 58-63). Put another way:

"Occidental's position is that the court must merely determine that Umm al Qaywayn was sovereign over the plaintiff's entire concession on November 18, 1969. If the plaintiff's concession was valid and in force in November, 1969, it remained valid and in force in November, 1971. Intervening territorial claims, however asserted, could not effect the plaintiff's vested property right in its concession, because not even an actual change in sovereignty alters vested property rights."[1]

Based on these arguments, plaintiff asserts that defendants

"cannot obtain summary judgment on the basis of assertions made in brief, however frantic, nor on the basis of selected readings, whether in farsi, urdu, swahili, or for that matter, english."

[1] *United States* v. *Rice*, 17 U.S. (4 Wheat.) 246, 4 L.Ed. 562 (1819); *Cobb* v. *United States*, 191 F.2d 604 (9th Cir. 1951), cert. denied, 342 U.S. 913, 72 S.Ct. 360, 96 L.Ed. 683 (1952).



RES JUDICATA AND COLLATERAL ESTOPPEL AS A RESULT OF OCCIDENTAL PETROLEUM CORPORATION VS. BUTTES GAS & OIL COMPANY, 331 F.Supp. 92 (C.D. California, 1971), AFFIRMED AT 461 F.2d 1261 (9 Cir., 1972), WRITS DENIED 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed. 2d 221.

The prior action and the instant one assert the same right: an alleged exclusive right to explore and develop the petroleum resources of the disputed area in the Persian Gulf. The wrong asserted is basically the same—that is, the interference and deprivation of its lease concession rights in that area. But the cause of action is different and at least one new event transpired after the California decision became final—the delivery of the oil in the United States.

Res judicata requires two suits involving the same cause of action. *Lawlor* v. *National Screen Service Corporation* 349 U.S. 322, 326, 75 S.Ct. 865, 99 L.Ed. 1122 (1955); *Exhibitors Poster Exchange, Inc.* v. *National Screen Service Corporation,* 421 F.2d 1313, 1316 (5th Cir. 1970). Comparison of the complaint in the instant case with the one in California demonstrates that the causes of action are not the same. In California, Occidental alleged a violation of antitrust laws based on various activities of Buttes and others, including an *attempted* confiscation of its oil concession. The present complaint asserts the right to recover oil within the control of the Court, and a claim traced through an alleged confiscation of a concession agreement. Despite the almost identical factual background, the two causes of action are different.

The motion to dismiss on the basis of res judicata must be denied. It is.

Collateral estoppel forecloses relitigation of all issues litigated in a prior proceeding. It is immaterial that two

actions are different, tried on different grounds, or instituted for different purposes and seek different relief. *Parker* v. *McKeithen*, 488 F.2d 553 (1974). But a legal finding may be successfully utilized as collateral estoppel only when it is evident from the pleadings and the record that the finding was necessary to the final decree and was foreseeably of importance in possible future litigation. *Hyman* v. *Regenstein*, 258 F.2d 502-510 (5th Cir., 1958). Our duty is to examine the decision of the Court in the prior litigation and determine the precise perimeter of the judgment. The California court reached two very pertinent ultimate conclusions:

1. The claim alleged could not prevail without an inquiry into the authority for and motivation of the acts of foreign sovereigns, and the Act of State Doctrine precluded such an inquiry.

2. The portion of the complaint in issue did not fall within the ambit of the Hickenlooper Amendment, for the reason that the complaint refers to "an attempted confiscation," whereas the statute applies only to a "confiscation or other taking."

These two determinations were the only necessary and essential requisites to the dismissal. The present complaint alleges an actual confiscation, but it was surely foreseeable that the two other observations made by Judge Pregerson would be of importance in possible future litigation:

3. "The conduct of Sharjah did not amount to an effective confiscation; rather, plaintiffs were allegedly deprived of their concession only by the cooperative effect of a number of acts of state, of which Sharjah's claims were not the most efficacious. This is



not a situation at which the Sabbatino Amendment was aimed." 331 F.Supp. at 112.

4. "Regardless of the wording of the complaint, it would be conceptually and prudentially hazardous to treat the territorial waters claim of Sharjah as a 'confiscation' subject to adjudication under the international legal standards governing that kind of act. Claims to territory are a different matter from the expropriation of corporate property within or appertaining to that territory." (footnote 33, at page 112).

Armed with this language, defendants insist there should be no litigation encore. The passages contained in paragraphs "(3)" and "(4)" cannot be ignored, especially in view of the language used by the Ninth Circuit in the per curiam affirmation:

> "The dismissal was correct. We affirm for reasons stated in the district court's opinion." (461 F.2d 1261).

and by Judge Pregerson, below:

> "The pleading is insufficient to invoke the Sabbatino Amendment for several reasons." (underscoring ours).

The enigma—what "reasons stated in the district court's opinion" formed the basis for the affirmance? Our attempt to carve our way through this litigation has not given us the answer. Doubt must be resolved by denial. Accordingly, we *decline* to hold that the Doctrine of Collateral Estoppel by Judgment operates to prevent plaintiff from re-litigating the issue of applicability of the Hickenlooper Amendment.

### Indispensable Parties

Defendants persist in arguing that Sharjah, Iran and Umm Al Qaywayn are indispensable parties. Arguably, an adjudication in plaintiff's behalf might greatly affect the territorial and financial interest of Sharjah, Iran and Umm. Be that as it may, the argument of indispensability and the decisions cited in support are not persuasive in this factual situation.

None of the absent sovereigns can be joined. As to Sharjah and Iran, the alleged confiscating sovereigns, a holding of indispensability would render illusory the very rights that the Hickenlooper Amendment seeks to preserve. Rule 19 of the Federal Rules of Civil Procedure will permit this action to proceed in absence of the sovereigns who cannot be joined. Rule 19(b) applies where joinder of a missing party is not feasible:

> (b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Federal Rules of Civil Procedure, Rule 19(b).



Rule 19 directs a pragmatic analysis, not one dictated by the application of formal categories. Note of the Advisory Committee on Civil Rules, 39 F.R.D. 69, 90-93 (1966); see *Kaplan, Continuing Work of the Civil Committee; 1966 Amendments of the Federal Rules of Civil Procedure* (I), 81 Harv.L.Rev. 356, 363, 367 (1967). The application and effect of Rule 19(b) are discussed in the opinion of the United States Supreme Court in the case of *Provident Tradesmen's Bank and Trust Company* v. *Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968).

We conclude that practical consideration of the rights and interest of the present parties to the suit and of those of the absentees require that the case proceed in this forum even though the absentees cannot be brought into the action.

The motion to dismiss pegged on the absence of indispensable parties is denied.

### Boundary Dispute—Act of State Doctrine

In the California case, Judge Pregerson: "The determination of foreign states' boundaries is not a permissible function of this court," (331 F.Supp. at 103) but declined to dismiss because the antitrust allegations did not require a determination of foreign boundaries. Our appreciation of the law and the issues in the instant case require a different approach.

Throughout this litigation defendants have treated as an unassailable rule of law the premise that a United States Court cannot decide a case involving the private rights of private parties to property if the adjudication of those rights requires a collateral determination of any kind with respect to boundaries. We do not read the jurisprudence to be that all-embracing. We prefer a narrower

construction, and conclude that if the resolution of the boundary dispute requires inquiry into the authenticity and motivations of the acts of foreign states, then and in that case judicial resolution would be inappropriate. This issue reflects the unconventional nature of this litigation, which arises out of the claims and acts of a number of foreign states. The concerns aroused by the boundary aspects are intricately interwoven with the Act of State Doctrine. The two must be considered together, vis-a-vis the Hickenlooper Amendment.

ACT OF STATE DOCTRINE

To set the stage for a discussion of what the Court feels is the most substantial ground for defendants' motion, we take the liberty of quoting extensively from the district court's opinion in *Occidental Petroleum Corp.*, supra, at pp. 108-109:

> "In *Underhill* v. *Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897), the Supreme Court first definitively held that 'the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.' This 'classic American statement of the act of state doctrine' was reaffirmed by the court most recently in *Banco Nacional de Cuba Sabbatino*, 376 U.S. 398, 416-418, 84 S.Ct. 923, 934, 11 L.Ed.2d 804 (1964). In the *Sabbatino* case, the bases of the doctrine were at last explicitly elaborated. The act of state doctrine, it was held, is not required by international law. 376 U.S. at 421-422, 84 S.Ct. 923. Nor is it compelled by notions of sovereign authority, although they 'do bear upon the wisdom of employing' it. *Id.* Finally, the doctrine is not required by the Constitution. 376 U.S. at 423-424, 84 S.Ct. 923.



> "The act of state doctrine does, however, have 'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the interrnational sphere."
>
> "In sum, the doctrine is a reflection of the executive's primary competency in foreign affairs, and an acknowledgment of the fact that in passing upon foreign governmental acts the judiciary may hinder or embarrass the conduct of our foreign relations. See 376 U.S. at 427-428, 431-433, 84 S.Ct. 923."

A more descriptive justification of the doctrine is found in *Frazier* v. *Foreign Bondholders Protective Council*, 283 App.Div. 44, 125 N.Y.S.2d 900, 903 (1953):

> "It is a doctrine born of expediency, nourished in the council halls of nations as well as the courts of justice. Its dominant motif is political. It has gained stature in the world of international diplomacy and politics, where an 'incident' involving the dignity of nations is measured by its explosive potential as well as its legal implications."

When foreign governments perform an act of state which changes the relationship of the parties touching the "res,"

and this change results in an accomplished fact (as here), then it would be an affront to such a foreign government for courts of the United States to hold that such act was a nullity. The entire fabric of the complaint is woven out of attacks on the validity of, or questioning the reasons for, the acts of Sharjah, Iran and Umm, with respect to the precise rights which plaintiff asserts. It traces a series of wrongs of foreign states to reveal why the lease agreement cancellation by Umm was invalid and why neither Sharjah nor Iran had a right to honor the lease contract (concession) by Buttes and its joint venturers; or to put it another way, to explain why the failure to honor Occidental's concession agreement constituted a confiscation. Nothing in *Rice* (supra) and *Cobb* (supra) will relieve this court from a forbidden inquiry into acts of state unless, of course, it is the Hickenlooper Amendment.

A listing of numerous acts of state appear in plaintiff's petition:

(1) Plaintiff claims title and right to the oil on the ground that Umm Al Qaywayn validly granted it an exclusive right to explore and exploit the disputed area, and never validly terminated that right. Umm Al Qaywayn's notice of termination was invalid, and attempts to explain the invalidity on the ground that Umm Al Qaywayn's sovereignty over the area was suspended, in fact, "as a result of actions of Sharjah and Iran * * *."

(2) Sharjah "allegedly issued" an unpublished decree dated September 10, 1969—a decree assertedly contrary to treaty obligations with the British Government—"purporting to extend" its territorial waters to twelve nautical miles.

(3) Sharjah granted Buttes an oil concession on December 29, 1969.



(4) The concession was amended on April 7, 1970, "so as to extend" the concession area from three to twelve miles off the coast of Abu Musa, and this was done in furtherance of the purposes of the Ruler of Sharjah to enlarge the concession area granted by him on December 29, 1969, to Buttes, so as to include the structure in the disputed area, and "thus to enable the Ruler of Sharjah to share with Buttes the substantial revenues to be derived from the underwater structure."

(5) Sharjah, in May of 1970, rejected a suggestion of the British Foreign Office that Occidental be allowed to operate within the disputed area pending arbitration.

(6) Sharjah, in May of 1970, requested the British Foreign Office to prohibit all operations in the area pending determination of the dispute by arbitration.

(7) In May of 1970 Iran made a claim to Abu Musa which was "without foundation and contrary to historical fact * * *."

(8) In July of 1970 Sharjah consented to the British Government's appointment of a mediator.

(9) Sharjah rejected the mediator's proposals, which were made on or about September 28, 1970.

(10) In November, 1971, Sharjah and Iran "confected" a "Memorandum of Understanding" relating to Abu Musa, allegedly in disregard of Occidental's vested rights to operate in the concession area. The Memorandum of Understanding provided that neither Iran nor Sharjah would recognize the other's claim of sovereignty over Abu Musa; that Iranian troops would arrive and occupy part of the island; that both Sharjah and Iran would recognize the breadth of Abu Musa's territorial sea as twelve nautical

miles; that exploitation of the petroleum resources of the seabed and subsoil beneath the territorial sea would be conducted by Buttes; and that half the governmental oil revenues would be paid directly to Iran and the other half to Sharjah.

### Hickenlooper

No doubt disturbed by the deteriorating conditions between the United States and Cuba and by the Supreme Court decision in *Sabbatino,* Congress, on October 2, 1964, quickly passed the Hickenlooper Amendment to the Foreign Assistance Act of 1964, the avowed purpose of which was to "reverse in part the recent decision of the Supreme Court in *Banco Nacional de Cuba* v. *Sabbatino*" (U. S. Senate Foreign Relations Committee, July 10, 1964). The statute provides:

> "Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law • • •; *Provided,* That this subparagraph shall not be applicable • • • (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court."



This so-called exception to the acts of state doctrine encountered strenuous opposition from the executive branch during its passage through Congress.[4] In a similar vein, the Amendment has been very stringently applied and strictly construed. This limited exception controls only when (a) a claim of title or other right to property is asserted[5](b) based upon a confiscation or other taking (c) in violation of international law.

The issue quickly narrows: Are defendants precluded from invoking the act of state doctrine by the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S. C.A. 2370(e)(2)? We believe the answer must be in the negative.

First: Giving full consideration to the asserted new events,[6] we agree with Judge Pregerson's observation that "it would be conceptually and prudentially hazardous to treat the territorial waters claim of Sharjah as a 'confiscation' under the legal standards governing that kind of

---

[4] For an extensive review of the amendment's pertinent legislative history see *Banco Nacional de Cuba* v. *First National City Bank of N.Y.*, 431 F.2d 394 (2nd Cir., 1970) at pp. 400-402.

[5] For the Sabbatino Amendment to be applicable, circumstances must precisely fit the statutory language. In *French* v. *Banco Nacional de Cuba*, 23 N.Y.2d 46, 295 N.Y.S.2d 433, 444, 242 N.E. 2d 704, 712 (1968) the Chief Judge declared that

> "[it was] abundantly clear • • • that Congress was not attempting to assure a remedy in American courts for every kind of monetary loss resulting from actions, even unjust actions, of foreign governments. The law is restricted, manifestly, to the kind of problem exemplified by the *Sabbatino* case itself a claim of title or other right to *specific property* which had been expropriated abroad." (Emphasis added).

[6] The Sharjah-Iran annexation, followed by non-recognition of Occidental's concession and the importation of oil into the United States.

act." We find nothing in the wording of the statute or in its legislative history which would give plausibility to Occidental's major premise that the conduct of Sharjah and/or Iran amounted to a "confiscation." We cannot ascribe to the belief that a confiscation of plaintiff's concession agreement occurred when Sharjah and Iran allegedly extended their territorial waters claim to include the disputed area. Territorial waters claims are subject to a body of international law, wholly different from that related to confiscations. See e. g. *McDougal and Burke, The Public Order of Oceans,* 486-98, 520-61; see also *Major Middle Eastern Problems in International Law, American Enterprise Institute for Public Policy Research* (1972). We hold that the conduct set forth in the complaint did not amount to a confiscation within the meaning of the Hickenlooper Amendment. Contrariwise, the record reveals that plaintiffs were allegedly deprived of the enjoyment of their concession only by the cooperative effect of a number of acts of state by Sharjah, Iran and Umm Al Qaywayn. This is not a situation at which the Sabbatino Amendment was aimed. *Occidental Petroleum Corp.* v. *Buttes Gas & Oil,* supra. On its face a claim to submerged lands and their superadjacent waters coincidental with a lease for the exploration of mineral resources could not conceivably have been envisioned by Congress to rise to the magnitude of a confiscation within the narrow confines of the Hickenlooper Amendment.

SECONDLY: The United States Court of Appeals for the Second Circuit has on at least two occasions made an exhaustive analysis of the Amendment's legislative history and concluded that its effect is limited to cases involving claims of title with respect to American owned property nationalized by a foreign government, and that the amend-



ment was inapplicable to contract claims. *Menendez* v. *Saks & Co.,* 485 F.2d 1355 at 1372 (1973) cert. granted on other grounds, 416 U.S. 981, 94 S.Ct. 2382, 40 L.Ed.2d 758; *Banco Nacional de Cuba,* 431 F.2d 394 (1970).[7] Further support for this interpretation of the Hickenlooper Amendment is found in *French* v. *Banco Nacional de Cuba,* 23 N.Y.2d 46, 295 N.Y.2d 433, 242 N.E.2d 704 (1968), where the New York Court of Appeals held that a claim for breach of contract is not a " 'claim of title or other right to property' within the meaning of the Hickenlooper Amendment," and that the repudiation of a contractual obligation does not amount to a "confiscation or other taking," as those terms are used in the statute.[8]

Applying these principles to the instant case, what was allegedly confiscated? It was not the oil which was extracted from the disputed area by Buttes in 1974. It was not an oil well or an oil mine. The well from which the oil was extracted was owned by Buttes and developed and drilled by them, pursuant to their concession agreement with Sharjah. The property allegedly confiscated was the Occidental concession. It was not the confiscation of an oil well. The "concession agreement" was nothing more than a lease contract under which the lessee agreed to pay certain considerations to the lessor for the privilege of exploring, drilling for, and extracting oil. A true and correct Xerox copy of the agreement has been filed by plaintiff as its Exhibit "1."

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[7] Upon its review of the Banco case, the Supreme Court did not disturb the conclusion reached by the Second Circuit that the Hickenlooper Amendment was inapplicable. See *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759 at 780, note 5, 92 S.Ct. 1808, 32 L.Ed.2d 466.

[8] See also 12 A.L.R. Fed. at 815.

Simply stated, the concession agreement was a contractual right to explore for and extract oil from a given area. This agreement did not constitute "a claim of title or other right of property" within the meaning of the amendment. We so hold.[9]

THIRDLY: Plaintiff, in order to prevail on the merits, must prove its lease agreement was valid as of the date the oil was extracted. In June of 1973, before the oil in question was extracted from the disputed area, Umm Al Qaywayn, the source of plaintiff's concession agreement, terminated the agreement.[10] The act of state doctrine precludes inquiry into reasons for or the validity of the cancellation unless Hickenlooper is applicable.[11] We do not be-

[9] Significantly, defendants have not pressed the conclusions reached as to the confiscation and/or repudiation of contract rights. This would have been inconsistent with their insistence that we dismiss on the basis of "res judicata" and/or "collateral estoppel." We note, too, plaintiff's suggestion in footnote 3 of its reply memorandum that the legislative history set out in *Banco* (431 F.2d 394) indicates that the amendment is applicable to "oil concessions." We do not agree. The colloquy between Professor Olmstead and Congressman Frazier had to do with ore or oil from an expropriated mine or well.

[10] Article 26.1 of the Agreement:

> "The Ruler shall have the right to terminate this Agreement upon three (3) months prior written notice to Occidental:
>
> "(a) if Occidental has not fulfilled the obligations provided for in Article 4 hereof; or
>
> "(b) if Occidental shall be in default of an arbitration award under the arbitration provisions of this Agreement."

[11] Occidental's case is premised on the proposition that Umm was sovereign over the disputed area on November 18, 1969. The cancellation, they argue, is to be disregarded because Umm is no longer sovereign. But as we see it, the question of who was sovereign and when, are themselves inquiries into the reasons for and/or the validity of acts of state. It barely requires emphasis



lieve it applicable and so conclude. *Franch* v. *Banco Nacional de Cuba*, 23 N.Y.2d 46, 295 N.Y.S.2d 433, 242 N.E.2d 704.

FOURTHLY: "Hickenlooper" requires title to confiscated property and its proceeds to be determined as of the date of confiscation. The petition alleges this occurred in November of 1971. Concededly, in 1970 a boundary dispute existed between Iran, Sharjah and Umm. To decide whether or not there was a confiscation would require a determination of that boundary dispute. Who owned the disputed area as of November, 1971? Even as of today, Iran and Sharjah have deferred a determination of title as between them. Then, too, Umm's possible ownership is not being ignored (30% of Sharjah's share of what it collects from Buttes).

Summarizing: Practical considerations underlying a specific situation must be precisely examined to avoid conclusions making for eventual confusion and conflict. The instant case presents one of those problems for the rational solution of which it becomes necessary to take soundings. The case before us is this: Sharjah and Iran recognize the Buttes' concession. Umm cancelled the Occidental concession, but participates in the rentals received from Buttes. In light of this history and what we perceive to be the purpose of Hickenlooper, I just cannot bring myself to believe that Congress intended to permit United States Courts to tell these three foreign countries: "You are

that the Ruler of Sharjah pays the Ruler of Umm 30% of Sharjah's share of the total revenue accruing to it and payable by Buttes pursuant to its concession agreement with Sharjah and Iran (See affidavit of D. Paul Fitzgibbon, filed by plaintiff in these proceedings).

wrong and we are right as to the ownership of your offshore waters."

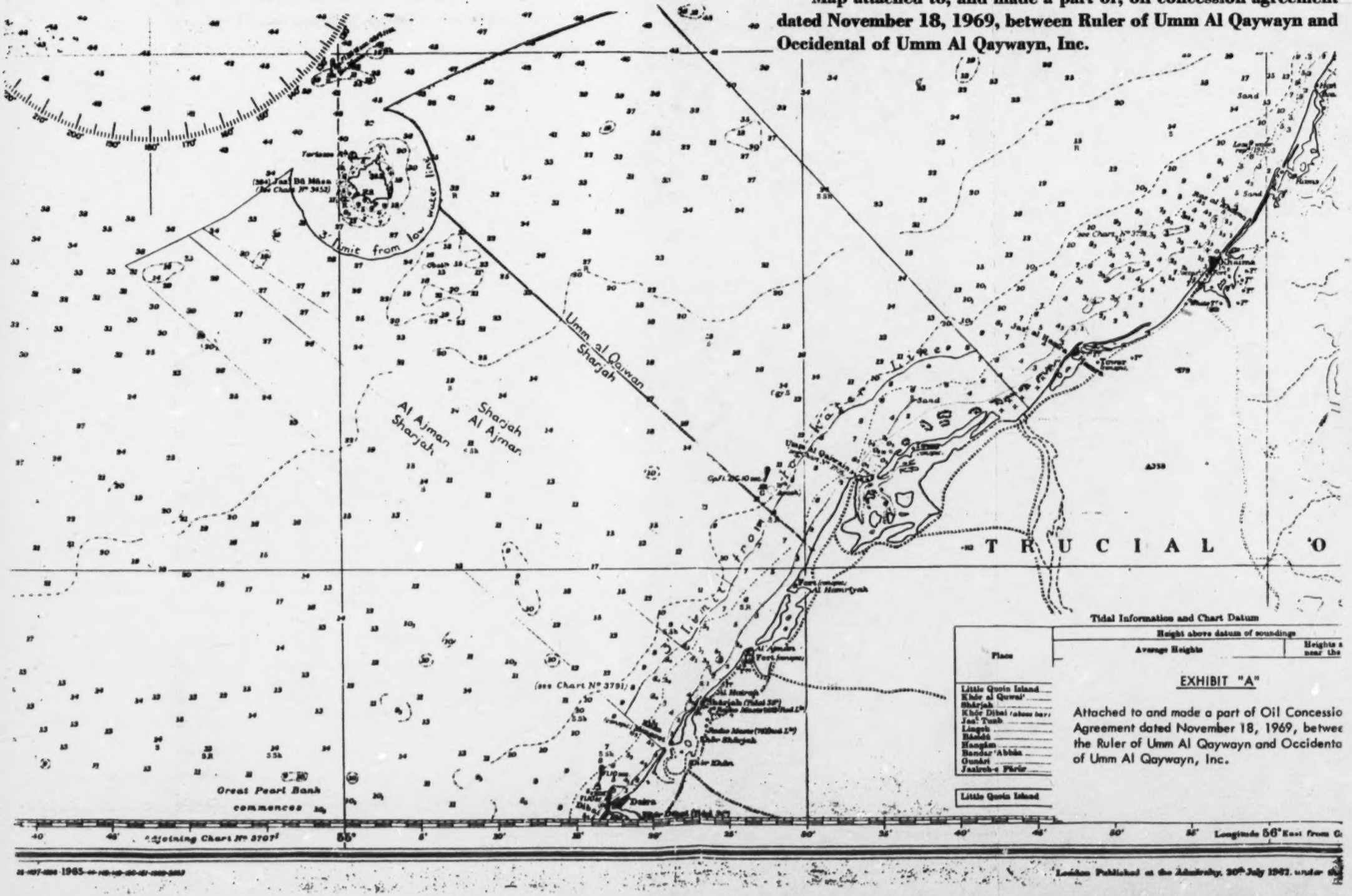
The motion for summary judgment should be granted in each case. So ordered.

DEFENDANTS' REQUEST FOR INJUNCTION TO ENJOIN ALL FURTHER LITIGATION BASED ON THE SUBJECT MATTER

The facts alleged in each of the 58 pending actions and the manner in which they are set forth are virtually identical. The factual distinction is that different ships and their cargoes are involved. There are no inherent obstacles preventing a district court from issuing orders which affect litigation in other courts, state or federal. This court has the discretionary power to issue a single injunction forbidding further proceedings in the pending cases awaiting the final outcome of this litigation. However, we feel it would be highly prejudicial to issue such an order. This is so because the order would deprive the plaintiff of its statutory remedy with respect to further shipments of oil by the defendants to the United States before a final determination of its claim. The request for injunctive relief to enjoin *all* further litigation is denied.

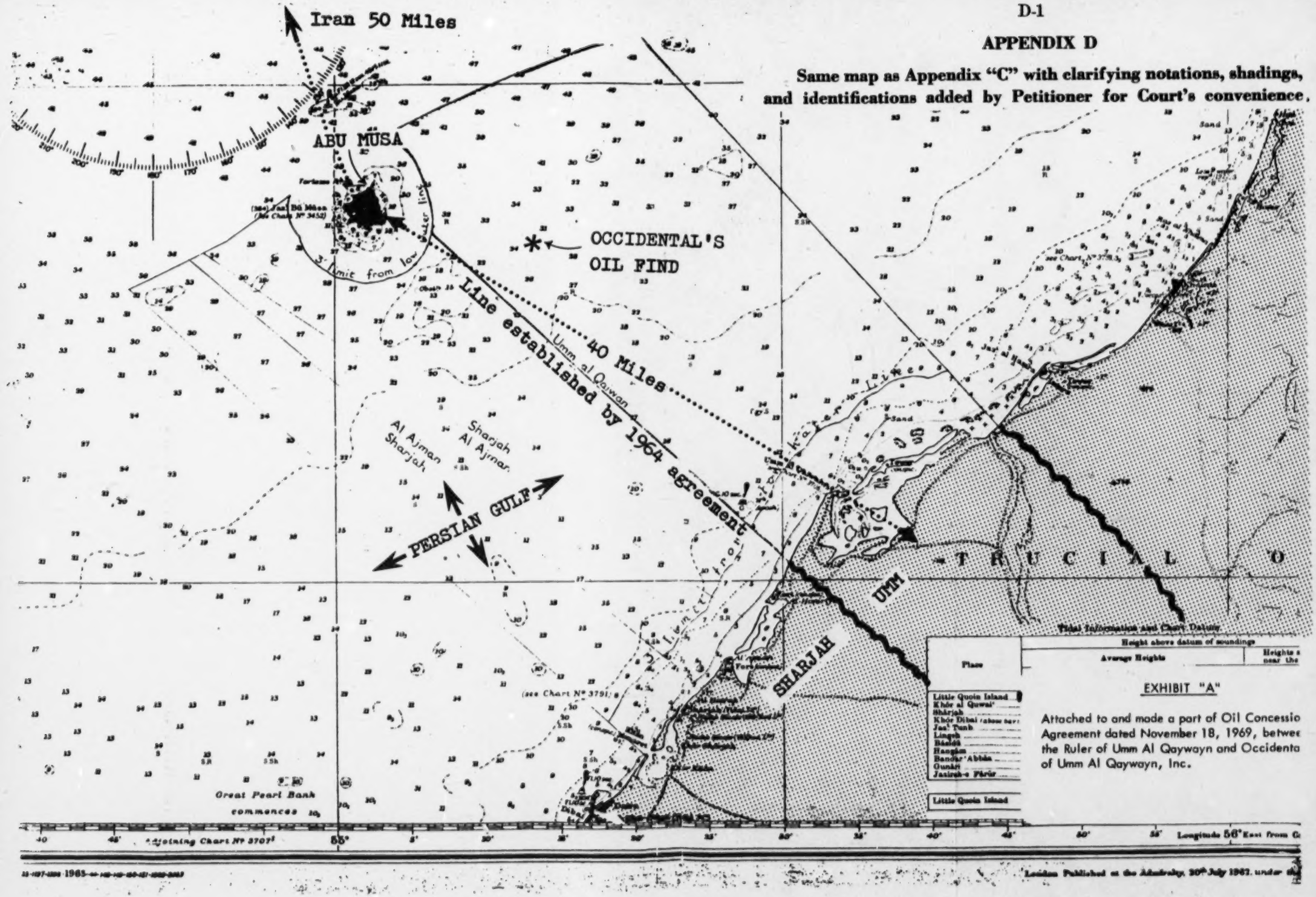
## APPENDIX C

**Map attached to, and made a part of, oil concession agreement dated November 18, 1969, between Ruler of Umm Al Qaywayn and Occidental of Umm Al Qaywayn, Inc.**



## APPENDIX D

**Same map as Appendix "C" with clarifying notations, shadings, and identifications added by Petitioner for Court's convenience.**



IN THE

# Supreme Court of the United States

OCTOBER TERM 1978

**No. 78-910**

OCCIDENTAL OF UMM AL QAYWAYN INC.,
*Petitioner,*

vs.

CITIES SERVICE OIL CO., *et al.*,
*Respondents.*

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OCCIDENTAL OF UMM AL QAYWAYN INC.,
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VS.

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---

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### QUESTIONS PRESENTED

The petitioner's statement of questions does not describe the questions which would be presented to this Court if a writ of certiorari were to issue. The questions which would be presented are the following:

1. Whether the complaint presents a political question rather than a case or controversy within the meaning of Article III of the Constitution, when it would require the court:

(a) to resolve a dispute between foreign states (Iran, Sharjah and Umm Al Qaywayn) as to the boundaries of their continental shelf lands in the Persian Gulf (also called the Arabian Gulf), and

(b) to resolve a dispute between Iran and Sharjah as to which one of them was sovereign over the island of Abu Musa, which is located in the Persian Gulf?

2. Whether a court of the United States may entertain a complaint which would require, for the plaintiff to prevail, that acts of the states of Iran, Sharjah, Umm Al Qaywayn and the United Kingdom be declared invalid, and that the reasons for acts of these states be determined?

3. Whether the Hickenlooper Amendment permits inquiry into acts of Iran, Sharjah, Umm Al Qaywayn and the United Kingdom some of which are not alleged to be confiscations in violation of international law?

4. Whether a complaint lies within admiralty jurisdiction where the only maritime tort alleged in the complaint is a "conversion" caused by the production of crude oil from a deposit in the submerged lands of the Persian Gulf and the movement of said oil to a drilling platform permanently affixed to the sea bed?

5. Whether a court may entertain a complaint which if successful would invalidate a concession agreement which was granted by one foreign state (Sharjah) and in which two other foreign states (Iran and Umm Al Qaywayn) enjoy partial interests from the grantor, when none of the three foreign states have been joined as a party?

6. Whether *res judicata* precludes maintenance of a complaint which seeks a declaration of entitlement to oil produced in the Persian Gulf and which calls into question the same acts of foreign states (Iran, Sharjah, Umm Al Qaywayn and the United Kingdom) when a prior judgment in another action held could such acts not be called into question?

7. Whether the plaintiff is collaterally estopped from questioning the reasons for and the validity of acts of Iran, Sharjah, Umm Al Qaywayn and the United Kingdom, in view of the fact that the final judgment in an earlier federal action brought by the same plaintiff in California decided the same issues?



## SUMMARY OF REASONS FOR DENYING THE PETITION

The petition should be denied because the Court of Appeals correctly decided that the complaint raised political questions as to the territorial sovereignty and boundaries of foreign states which the federal courts lack jurisdiction to resolve.

The petition is defective because it is based on a fundamental misconception. It assumes that there can be no issues of territorial sovereignty as to Iran or Sharjah, on the theory that those states cannot have continental shelf rights for the island of Abu Musa. In fact, both customary international law and the Convention on the Continental Shelf, TIAS 5578 (Apr. 29, 1958), expressly recognize that islands have continental shelves.

The petition should also be denied because there are five other grounds, not reached by the Court of Appeals, which require judgment for respondents. They are the act of state doctrine, the absence of admiralty jurisdiction (in one case), the absence of indispensable parties, *res judicata,* and collateral estoppel as to outcome—determinative issues.

## STATEMENT

This appeal involves three consolidated actions initiated by Petitioner (hereinafter called "Occidental") in the Western District of Louisiana, Lake Charles Division. Two of the actions are based on diversity of citizenship. The third asserts a claim in admiralty. Each action claims title to a different cargo of oil landed at a port in the Western District of Louisiana.

The single cause of action asserted in each complaint is a tort claim for conversion of crude oil. The oil in question was produced from a field in the Persian Gulf on the continental shelf of the island of Abu Musa, nine miles off the coast of the island. Abu Musa is about forty miles from the coastline of the Arabian peninsula, which lies to the south, and fifty miles from the coastline of Iran, which lies to the north. The oil was

produced by respondents in joint venture, in accordance with a concession agreement issued in 1969 by Sharjah to Buttes Gas and Oil Co. (one of the respondents, and hereinafter called "Buttes") and assented to by Iran in 1971.[1] Both Sharjah and Iran claim to own the island of Abu Musa.

The dispute between Iran and Sharjah over Abu Musa is well known and long-standing, having been the source of continued assertions and counter-assertions from at least the nineteenth century. The history of this dispute is reported in official documents of the United Kingdom and of the United States, as well as in scholarly works. Efforts at resolution of the dispute under the auspices of the British government during the period of the British presence in the Trucial States bore fruit on the eve of British departure in November 1971, when, with British approval, Iran and Sharjah entered an agreement. The agreement provided that neither Iran nor Sharjah recognized the other's claim of sovereignty over Abu Musa; that Iranian troops arrive and occupy part of the island; that the island's territorial sea was twelve nautical miles; that exploitation of the petroleum resources of the seabed and subsoil be conducted by Buttes; and that half the government oil revenues be paid directly to Iran and the other half to Sharjah. (Complaint, ¶ NINETEENTH, App. 11-12.)[2]

Occidental's complaint does not claim that Occidental has or had a concession agreement from Sharjah or Iran. It claims

[1] Sharjah was among the seven Trucial States of the Persian Gulf, as to which the United Kingdom exercised certain supervisory powers over defense and foreign relations. The British Forces withdrew on or about November 30, 1971. Thereafter, the Trucial States confederated as the United Arab Emirates.

[2] The British role in bringing about the settlement is described by Sir Colin Crowe, the British Representative to the United Nations Security Council, in an address before the Security Council on December 9, 1971. Records of the 1610th meeting of the Security Council, U.N. Doc. S/PV. 1610, 5, 18-20 (Dec. 9, 1971) (App. 207) (References to the record will be cited to the Appendix page numbers.).



the oil from the disputed area by reason of a concession agreement Occidental obtained on November 18, 1969 from Umm Al Qaywayn (then a Trucial State). That concession, allegedly for the entire continental shelf claimed by Umm Al Qaywayn, included the disputed area nine miles from Abu Musa. Occidental contends that in 1964 Sharjah and Umm Al Qaywayn, with British assistance, agreed by two unilateral declarations to divide the forty mile continental shelf distance between the coastline of Umm Al Qaywayn and Abu Musa, not on usual median-line principles, but by drawing a line three miles off the coast of Abu Musa, thus allegedly giving Umm Al Qaywayn 37 of the 40 miles of their shared continental shelf. Appendix D of the petition, which is a map that is not part of the record in this action, and on which Occidental has written the phrase "clarifying notations, shadings and identifications . . .", is grossly misleading in that it purports to show elements of an agreement totally unsupported by the record. The two declarations referred to by Occidental merely designated coastal points from which lines would be drawn seaward, and the bearings of those lines, and did not mention Abu Musa; did not attach or refer to any map; did not discuss how any island was to be treated; and did not set forth or discuss any frontal boundary between Abu Musa and Umm Al Qaywayn.

Moreover, Iran was not a party to the unilateral declarations by the Ruler of Umm Al Qaywayn or the Ruler of Sharjah, and Occidental does not assert that such declarations, whatever their import, were made on behalf of or were binding upon Iran.

Occidental's concession was cancelled by Umm Al Qaywayn in June 1973 because Occidental failed to make payments provided for by its concession agreement. (App. 13.) This fact is not mentioned in the Petition. The Occidental concession agreement (App. 293-9) provided for arbitration of any disputes between the parties under the guidance of the rules of procedure described in the Rules of the International Court of Justice. Occidental agreed that the concession agreement would have the "force of law" and would be interpreted and

applied in accordance with principles of law recognized by civilized states in general, including those applied by International Tribunals. Occidental makes no claim that it sought to arbitrate the validity of Umm Al Qaywayn's cancellation of the concession.

Litigation between the parties began on June 25, 1970 when Occidental and its parent corporation (Occidental Petroleum Corp.) filed a complaint in the United States District Court for the Central District of California naming Buttes as a defendant. *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972). (That action is hereinafter referred to as the "California action" or the "prior action").[3]

The California action was dismissed by the District Court on the ground that the complaint could succeed only by proof of the invalidity of and the reasons for acts of foreign states, and that such an inquiry was forbidden by the act of state doctrine. The court also held that the complaint did not fall within the Hickenlooper Amendment's exception to the act of state doctrine. (331 F.Supp. 92.) The decision was affirmed *per curiam*, 461 F.2d 1261, *cert. denied*, 409 U.S. 950 (1972).

On November 30, 1971, the United Kingdom withdrew from the Persian Gulf in accordance with its previously announced intentions. Thereupon, in accordance with the prior arrangements between the United Kingdom, Sharjah and Iran, Iranian armed forces entered Abu Musa and were welcomed by representatives of the Sharjah Government. (App. 207 at ¶ 227.)

In April 1972, respondents began drilling operations nine miles off the cost of Abu Musa.

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[3] At the time Occidental filed the California action in the United States District Court it also filed an action in California State Court on the theory of inducing breach of contract. That action was dismissed by Occidental after it had lost the federal court action.



In June 1973, Umm Al Qaywayn terminated its concession agreement with Occidental, because Occidental failed to make the payments required by the concession agreement.

At a time prior to May 1974, according to Occidental, Umm Al Qaywayn and Sharjah entered into an agreement whereby Sharjah would pay Umm Al Qaywayn 30 per cent of Sharjah's revenues from the Buttes concession (App. 306).

In 1974 Buttes and its co-venturers began producing oil from the area. The oil was stored on an anchored storage facility from which it was loaded onto tankers. The first cargo arrived in the United States in September 1974, and was libelled in admiralty.

Occidental filed its first complaint below on September 13, 1974. The complaint asserted that Occidental rather than the respondents had the right to explore and exploit the disputed area off Abu Musa. The complaint alleged that the oil produced from the area belonged to Occidental, and that the oil was tortiously converted when respondents severed it from the seabed. As additional cargoes arrived, new complaints were filed. Some of the complaints purported to assert a tort claim under admiralty law; others, based on diversity of citizenship, purported to assert a tort claim under common law. There is no indication in the complaint as to which country's common law should apply.

In the courts below the respondents urged that five independent grounds supported the motion for summary judgment: (a) the complaint called for inquiry into the reasons for and the validity of the acts of foreign states in violation of the act of state doctrine; (b) the court lacked jurisdiction to determine the claim because to resolve it would require determinations of the territorial sovereignty and disputed boundaries of foreign states; (c) Iran, Sharjah and Umm Al Qaywayn were indispensable because the outcome could materially affect their interests but they were not named as parties; (d) the California action barred the instant action by reason of *res judicata;* and (e) Occidental was collaterally estopped in the instant action from raising outcome-determinative issues which were con-

clusively decided against it in the California action. Respondents separately urged that the admiralty action be dismissed because it stated no claim which would support admiralty jurisdiction.

The District Court granted the motion for summary judgment on the ground that the act of state doctrine precluded an inquiry into disputed acts of foreign states. The admiralty claim was dismissed for lack of admiralty jurisdiction. The opinion of the District Court is reported at 396 F.Supp. 461. The decision dismissing the admiralty claim was not published. The case was appealed to the Court of Appeals for the Fifth Circuit. The Attorney General of the United States, at the request of the Court of Appeals, filed a brief *amicus curiae*. That brief urged affirmance on the ground that the question presented was not a case or controversy within Article III of the United States Constitution, because resolution of the issues would involve political questions that the federal courts had no jurisdiction to decide. The Attorney General urged in the alternative that even if the court had jurisdiction, it should abstain from exercising it in this case. The Attorney General's brief conveyed to the court a letter from the Legal Adviser of the Department of State (hereinafter called the "State Department Letter"), stating that for the court to resolve the boundary disputes at issue in this case would be contrary to the foreign relations interests of the United States. For this Court's convenience, the Attorney General's brief and the Legal Adviser's letter are appended hereto as Appendix A.

The Court of Appeals held that the questions presented as to the ownership of lands disputed by foreign sovereigns were political questions of foreign relations, the resolution of or neutrality on which were committed to the executive branch by the Constitution. Hence, the court held no case or controversy was presented, and thus there was no subject matter jurisdiction. Because it decided that the court was without jurisdiction, the court declined to rule on the non-jurisdictional grounds asserted for affirmance which were common to all three appeal



cases, and did not rule on the question of admiralty jurisdiction which related to one of the three cases on appeal.

The Court of Appeals was correct in holding that there was no subject matter jurisdiction. The result below is also correct because it is independently supported on other grounds not relied upon by the Court of Appeals. The petition should be denied.

## ARGUMENT

### I. OCCIDENTAL'S CLAIM WOULD REQUIRE JUDICIAL RESOLUTION OF NON-JUSTICIABLE ISSUES CONCERNING FOREIGN SOVEREIGNTY AND BOUNDARIES.

#### A. Occidental Cannot Maintain A Claim That Respondents Converted Its Property, Since It Cannot Show That It Had A Valid Property Right.

Occidental alleges a property right by reason of the concession granted by Umm Al Qaywayn in 1969 (Pet. 6). Since the maxim *nemo dat qui non habet* ("he who hath not cannot give") is recognized in international law,[4] as well as in American,[5] British,[6] and Islamic law[7], Occidental's claim requires a finding that Umm Al Qaywayn had a property right which could be conveyed to Occidental. Thus, Occidental's case is necessarily premised on the allegation that, in 1969, when Occidental purchased its concession from Umm Al Qaywayn, that state possessed exclusive sovereign rights in the resources of the seabed at the location from which the oil in question was later produced by respondents. This location is between the island of Abu Musa and the mainland, some nine

[4] *See* Island of Palmas Case, 2 U.N. Rep. Int'l Arb. Awards 829, 842 (1928).

[5] *See* Garcia v. Lee, 37 U.S. (12 Pet.) 511, 521-22 (1838).

[6] *See* Broom's Legal Maxims 498 (8th Ed. 1882).

[7] *See* The Mejelle 28, 53-55 (C. Tyse, D. Demetrigdes, & I. Effendi trans. 1967).

miles from Abu Musa and 31 miles from Umm Al Qaywayn. Abu Musa is claimed by both Sharjah and Iran. The oil in question was produced pursuant to an agreement between those two states. Occidental, in effect, asks the Court to determine that neither Sharjah nor Iran, but only Umm Al Qaywayn, had exclusive sovereign rights in seabed resources at this location. Thus, it asks this Court to determine that Iran's claim to Abu Musa is invalid, and that Sharjah's continental shelf claim and its twelve-mile territorial sea claim are invalid.

The waters covering the seabed between Abu Musa and Umm Al Qaywayn have a depth of less than 200 meters, and therefore the seabed is, for legal purposes, "continental shelf."[8] As such, this seabed area is subject to certain sovereign rights of the states adjacent to it. The nature of these rights is articulated in Article 2 of the 1958 Convention on the Continental Shelf, which provides:

> The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

This article states the existing customary law with respect to the nature of the rights which a coastal state enjoys with respect to its continental shelf, *North Sea Continental Shelf Cases,* [1969] I.C.J. 3, 39. Since rules of customary law are binding on all nations, *The Paquete Habana,* 175 U.S. 677, 700, 708(1900), the provisions of Article 2 apply independently of the Convention on the Continental Shelf.

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[8] Article 1 of the 1958 Geneva Convention on the Continental Shelf, TIAS 5578 (Apr. 29, 1958) articulates the rule of customary law that:

> [T]he term 'continental shelf' is used as referring ... to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation ...



### 1. The Island Of Abu Musa Has A Continental Shelf.

Occidental suggests that this Court presume that the islands of the Persian Gulf may not have continental shelves. That is wrong. Islands, like mainlands, generate continental shelves. Article 1 of the 1958 Geneva Convention on the Continental Shelf provides:

> [T]he term 'continental shelf' is used as referring ... (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

The provisions of Article 1, like those of Article 2, codify existing customary law. *North Sea Continental Shelf Cases,* [1969] I.C.J. 3, 39. Therefore, the rule that islands have continental shelves applies independently of the Convention, and is binding on all states, including those which are not parties to the Convention.

Article 1 also makes clear that the continental shelf, including the continental shelf of an island, extends beyond the territorial sea:

> [T]he term continental shelf is used as referring ... to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea ....

State practice overwhelmingly confirms that islands have continental shelves which embrace seabed areas beyond the territorial sea.[9]

There has been one decision by an international tribunal concerning the extent of an island's continental shelf under customary law. In *United Kingdom of Great Britain and Northern Ireland and the French Republic, Delimitation of the Continental Shelf,* Court of Arbitration (June 30, 1977) (the *English Channel Arbitration),* the arbitral court (having

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[9] See U.S. Department of State, Limits in the Seas Nos. 1, 2, 9-12, 16-18, 24, 25, 42, 55, 56, 58, 62-69, 71-75, 77-80 (various dates, 1970-).

jurisdiction only by consent of the parties) delimited the continental shelf boundary between France and the United Kingdom. (A copy of the arbitration award is located in this Court's library). Part of this boundary involved the United Kingdom's Channel Islands, which are situated on the French side of the Channel (at one point these islands are only six and one-half miles from the French mainland). Applying customary law,[10] the arbitral court held that the Channel Islands, which have a territorial sea of three miles, are entitled to a 12-mile continental shelf.[11] And in the area beyond the Channel, the arbitral court delimited the boundary by means of the equidistance method, giving full effect to the French island of Ushant, and half-effect to the United Kingdom's Scilly Isles.[12] Although this part of the boundary was delimited pursuant to Article 6 of the Convention on the Continental Shelf, the arbitral court said repeatedly that, given the particular geography of the area, application of Article 6 and application of customary law produced the same result.[13]

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[10] *English Channel Arbitration*, at paragraph 147. The Court applied Article 6 of the Convention on the Continental Shelf to other parts of the boundary.

[11] A primary consideration underlying this holding appears to be the fact that the Channel Islands had an established 12-mile fishing zone. *Id.*, at paragraph 176. However, the fact that the United Kingdom had the potential of claiming a 12-mile territorial sea was apparently also relevant. At paragraph 166, the Court said:

> [T]he Court has to take account of the fact that, apart from their three-mile zone of territorial sea the Channel Islands have an existing fishery zone of 12 miles, expressly recognized by the French Republic, and the potentiality of an extension of their territorial sea from three to 12 miles.

Significantly, France did not argue that the islands were limited to their three-mile territorial sea; instead, France argued (unsuccessfully) that the Channel Islands should be given continental shelf rights to a distance of six miles.

[12] *English Channel Arbitration*, at paragraph 251.

[13] *Id.*, at paragraphs 65, 70, 75, 87, 109 and 148.



From the foregoing, it is clear that the island of Abu Musa generates a continental shelf beyond the limit of its territorial sea, whatever that limit is.[14]

**2. Abu Musa's Continental Shelf Rights Do Not Depend On Express Proclamation.**

Occidental argues that respondents lack standing to assert Abu Musa's continental shelf rights. That argument is misplaced. A nation need not claim its continental shelf rights, or occupy its continental shelf, to preserve its exclusive rights to explore and exploit the shelf's natural resources. Article 2 of the Convention on the Continental Shelf is quite explicit on this point:

> 2. The rights referred to in paragraph 1 of this article *are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.*
>
> 3. *The rights of the coastal State over the continental shelf do not depend on occupation, effective or notion-*

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[14] Occidental incorrectly asserts that respondents did not, until the appeal below, advert to the continental shelf basis of the claims of Iran and Sharjah. Respondents referred to the continental shelf basis of the claims to the disputed territory at the earliest stage of the proceedings in the District Court. See, for example, the statement at page 34 of respondents' Statement of Reasons and Memorandum of Points and Authorities Initial Brief In Support of Motion to Dismiss Action, filed in the District Court on November 6, 1974. (Excerpt attached as Appendix B) "The two concession agreements overlapped, as the complaint indicates, because there is an overlap between Umm Al Qaywayn's continental shelf claim to the area, and Sharjah's territorial sea and *continental shelf claims to the area.*" [Emphasis added.] Similarly, respondents' Reply Brief in the District Court, In Support of Motion to Dismiss or For Summary Judgment filed on April 4, 1975, at 27, (Excerpt attached as Appendix C) stated: "Thus, neither Sharjah nor Iran had to make express claims of continental shelf rights to Abu Musa. *Their long-standing claims to the Island were by themselves sufficient to manifest their claims for its adjacent continental shelf.*" [Emphasis added.]

*al, or on any express proclamation.* [Emphasis added]

The same rule was announced by the International Court of Justice in *North Sea Continental Shelf Cases* [1969] I.C.J.3, 22 as an expression of customary law:

> More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, —namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio,* by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. *In short, there is here an inherent right. In order to exercise it no special legal process has to be gone through, nor have any special legal acts to be performed.* Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is "exclusive" in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent. [Emphasis added.]

Thus, even the sovereigns themselves do not need to make or manifest a claim to their continental shelves, and there is no need for standing to point out that such claims exist.

In any case, the Department of State Letter reported to the Court of Appeals that the disputed area is continental shelf:

> These considerations are applicable to the question of Umm Al Qaywayn's sovereignty over the *continental shelf surrounding Abu Musa* at the time of the concession to Occidental and to the subsequent arrangements worked out among the affected states. [Department of State Letter, 1; Emphasis added]



In sum, there is no merit to Occidental's suggestion that Abu Musa be presumed not to have a continental shelf.

### 3. No Position Of The Executive Branch Would Confine Abu Musa's Exclusive Seabed Rights To A Three-Mile Belt Around Its Coast.

Occidental argues that since territorial sea claims greater than three miles are not recognized by the Executive Branch, Abu Musa cannot have any seabed lands outside that belt (Pet. 5). That argument lacks understanding of the law of the sea and the seabed. It confuses two distinct legal notions: territorial sea jurisdiction (sovereignty over the water column) and continental shelf jurisdiction (sovereignty over the natural resources of the seabed). The continental shelf, by definition *begins* where the seaward limit of the territorial sea ends. Article I of the Convention on the Continental Shelf so states as follows:

> For the purpose of these articles, the term "continental shelf" is used as referring (1) to the seabed and subsoil of the *submarine areas adjacent to the coast but outside the area of the territorial sea,* to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands. [Emphasis added.]

If Occidental's view of the law of the sea were correct, the United States would have no right to any submerged lands beyond three miles from our own coast, since the United States claims a territorial sea of three miles. In fact, the United States claims and allows exploitation of its shelf beyond the three-mile limit, as much as 120 to 200 miles from the coastline, in full

consonance with the Convention on the Continental Shelf. Nossaman, Waters, Scott, Krueger & Riordan, Study of Outer Continental Shelf Lands of the United States for the Public land Law Review Commission, 19-21 (1968). With respect to sovereignty over petroleum resources beyond the territorial sea, the United States was one of the first nations in the world to exercise such sovereignty when by the "Truman Proclamation" in 1945, Presidential Proclamation No. 2667, 59 Stat. 884 (Sept. 28, 1945), it declared the following policy:

> [T]he Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas [*i.e.*, beyond the territorial sea] but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.

This Court has given effect to the policy declared in the Truman Proclamation, *United States v. Maine,* 420 U.S. 515 (1975), as has the Congress, in the Outer Continental Shelf Lands Act, 67 Stat. 462, and the President, in the Maritime Boundary Agreement with Mexico (signed May 4, 1978; not yet ratified, XVII International Legal Materials, No. 5 (Sept. 1978) 1073).

Thus, it is clear that the policy of the United States is quite different with respect to a three-mile limit of the territorial sea, and with respect to the law of sovereignty over petroleum resources of the seabed beyond the territorial sea. Occidental's argument that this case could be determined by a three-mile rule is misconceived.

### B. To Determine The Territorial Sovereignty And Boundaries Of Foreign States Would Present Political Questions Which May Not Be Resolved By The Judiciary.

This Court's view, announced in *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 164-66 (1803) and reiterated in *Baker* v. *Carr,* 369 U.S. 186 (1962), that political questions are not



justiciable, has found frequent expression in the field of foreign affairs, because of the unique role of the Executive Branch in conducting foreign relations.

In *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 319 (1936), this Court stated:

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems the President alone has the power to speak or listen as a representative of the nation.

To like effect are *Oetjen v. Central Leather Co.,* 256 U.S. 297, 302 (1918), and *C. & S. Air Lines Inc. v. Waterman Corp.,* 333 U.S. 103, 111 (1948).

Questions concerning foreign territories and boundaries clearly fall within the sphere of foreign affairs to be handled by the Executive Branch. In holding an alleged grant by the Spanish government insufficient to confer title to certain lands situated in Alabama, this Court said in *De La Croix v. Chamberlain,* 25 U.S. (12 Wheat.) 599, 600 (1827):

> A question of disputed boundary between two sovereign independent nations, is, indeed, much more properly a subject for diplomatic discussion, and of treaty, than of judicial investigation.

And, in *Foster and Elam v. Nielson,* 27 U.S. (2 Pet.) 253, 309 (1829), holding that certain disputed property was ceded by Spain to France under the treaty of St. Ildefonso, and then from France to the United States under the treaty of Paris, the Court said:

> A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the Legislature.

To like effect are *United States v. Arredondo,* 31 U.S. (6 Pet.) 691, 711 (1832); *Garcia v. Lee,* 37 U.S. (12 Pet. 511, 517 (1838)), and *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.,* 331 F.Supp. 92, 103 (C.D.Ca. 1971), *aff'd,* 461 F.2d 1261 (9th Cir. 1972), *cert. denied,* 409 U.S. 950 (1972).

As Mr. Justice White explained in his opinion (dissenting as to an issue other than political question) in *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 461 (1964):

> Without doubt political matters in the realm of foreign affairs are within the exclusive domain of the Executive Branch, as, for example, issues for which there are no available standards or which are textually committed by the Constitution to the executive.

By footnote 20 at that point Mr. Justice White listed as one of the kinds political matters within the "exclusive domain" of the Executive Branch, issues as to "the territorial boundaries of a foreign state . . . ."

Since the instant case would require determinations as to whether Iran owned Abu Musa, and what was the boundary of the continental shelf of Abu Musa as between Umm Al Qaywayn and either Iran or Sharjah, the Court of Appeals correctly decided that political questions were raised and the court lacked jurisdiction.

That result is also consistent with the position of neutrality maintained by the Executive Branch. Assistant Secretary of State David M. Abshire stated the Executive Branch position in a letter of December 17, 1971 to the Honorable Lee H. Hamilton, Chairman, Subcommittee on the Near East, Committee on Foreign Affairs, United States House of Representatives, as follows (At pp. 203-205):

> The Secretary has asked me to reply to your letter of December 2 requesting comments on the Iranian Landings on the islands of Abu Musa and the two Tunbs in the Persian Gulf on November 30.
>
> The sovereignty of the islands in question has been contested for over a century. *The United States Government, which has never taken a position on the merits of the dispute between Iran and the United Kingdom,* believes that the Iranian landings on the islands must be viewed in the total context of a series of interrelated events in the Persian Gulf in the recent past.
>
> In anticipation of British withdrawal, Iran over a year ago began to press publicly its long-standing claim to the three small Gulf Islands in question. The Iranian insistence on placing garrisons on these islands derived from Iran's concern that otherwise the islands might be used at some point by hostile elements to threaten the flow of Iranian oil to the industrial nations. Iran entered negotiations with the British on the islands question. *The United States Government was not at any time involved in these negotiations nor did it take a position on the merits of the dispute.* [Emphasis added]



That position of neutrality continues to be the foreign policy of the United States, as stated by the Legal Adviser of the Department of State in a May 12, 1978 letter to the Assistant Attorney General James W. Moorman (Appended hereto as Appendix A). The Department of State stated its position as follows:

> We believe that the political sensitivity of territorial issues, *the need for unquestionable U.S. neutrality and the harm to our foreign relations which may otherwise ensue,* as well as the evidentiary and jurisprudential difficulties for a U.S. court to determine such issues, are compelling grounds for judicial abstention. [Emphasis added.]

The Department of Justice, concurring with the Department of State, recommended that the judicial branch abstain from determining the boundary in question, and dismiss Occidental's complaint. Brief for the United States, *Amicus Curiae,* at 7-15, *Occidental of Umm Al Qaywayn v. A Certain Cargo, etc.,* 577 F.2d 1196 (5th Cir. 1978). (Appendix A).

Thus, the foreign policy of the United States, as expressed by the Executive Branch, is to maintain neutrality on the merits of the territorial disputes which Occidental would have an American court resolve.

For the courts to disturb that neutrality would offend the spirit of *Williams v. Suffolk Insurance Co.*, 38 U.S. (13 Pet.) 415, 420 (1839) and *Jones v. United States*, 137 U.S. 202, 212 (1890).

The Court of Appeals was correct in declining to undermine the foreign policy of neutrality as to the boundary and sovereignty disputes here.[15]

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[15] In reaching this result the Court of Appeals did not abdicate its judicial responsibility, as Occidental seems to contend when it states: "It was not law, but a letter, that the Court of Appeals felt compelled it to refuse jurisdiction." Pet., 21.) It was the well-established jurisprudence of the political question doctrine that "compelled" the Court of Appeals to rule as it did. That court's opinion manifests a careful and correct analysis of the political question doctrine. In addition, Occidental charges without that the Court of Appeals dismissed the appeal on the ground of the political question doctrine, not because it believed that a political question existed but because it wanted to accommodate another branch of government. Pet. 20-21. In order to give a wholly misleading impression the petition quotes the opinion out of context.

The paragraph in question (577 F.2d at 1203-04) is set forth below, showing, in italics, the words selected by Occidental in its quotation:

> The ownership of lands disputed by foreign sovereigns is a political question of foreign relations, the resolution or neutrality of which is committed to the executive branch by the Constitution. As has been demonstrated, to determine whether a tortious conversion has occurred, it is necessary to determine the sovereign ownership of the portion of the continental shelf from which the oil was extracted. Although sovereigns are not directly involved, a judicial pronouncement on the sovereignty of Iran or Sharjah would be unavoidable. Such a determination is constitutionally reserved to the executive branch, however. Just as the judiciary will follow an executive determination as to which nation has sovereignty over a disputed area, *United States v. Klintock*, 5 Wheat. 144, 149, 5 L.Ed. 55 (1820), so must the judiciary refuse to decide the dispute in the absence of executive action because of that absence

*(footnote continued)*



### C. The Hickenlooper Amendment Does Not Confer Jurisdiction To Decide Political Questions

Occidental argues that the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 23 U.S.C. §2370(e)(2), provides a jurisdictional basis for this suit. The Hickenlooper Amendment is a statutory limitation on the scope of the act of state doctrine, overturning in part the rule expressed in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). It is Occidental's thesis that the political question doctrine, is just

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*(footnote continued)*

> of direction. That is, in the language of *Baker v. Carr, supra*, the question of sovereignty is committed to the executive branch by the Constitution, and decision of the issue is impossible in the absence of the executive policy decision. Additionally, *we are persuaded that a judicial determination would reflect a lack of respect for the executive branch, particularly the State Department.* Contained in the Government's amicus brief is a letter from the State Department indicating the importance of neutrality in the politically and economically sensitive Middle East. *A decision in this case, the State Department warns, would seriously impinge on executive neutrality. Therefore, we are convinced that the issue of sovereignty over disputed territory is a political question reserved to the executive branch.*

That selective quotation omits entirely the fundamental conclusion reached by the court that a determination of the sovereignty of Iran and Sharjah was "constitutionally reserved to the executive branch . . ." And, after eliminating the word "Additionally," which introduced the sentence relating to the State Department letter, the petition gives the false impression that the Court of Appeals was dissembling in its statement of reasons for its result. Occidental, after eliminating the word "Additionally," stated that "The very formulation of this sentence" revealed a *non sequitur*. In fact, the sentence contains a *non sequitur* only as recast by Occidental to remove its critical first word, "Additionally." Thus, there is no merit to petitioner's accusation that the Court of Appeals relied upon the State Department letter and not upon the law.

Moreover, in reaching its conclusion the Court of Appeals gave due heed to the six factors identified in *Baker v. Carr*, 369 U.S. 186 (1962), as relevant in ascertaining when a political question is presented. In *Baker* v. *Carr*, this Court held that the inextricable presence of any one or more of those factors shows that a political question is presented.

The Court of Appeals found that in the instant case "nearly every one of the factors is present and the vitality of the political question in

another formulation of the act of state doctrine, and is therefore subject to being overriden by the Hickenlooper Amendment.[16]

The political question doctrine and the act of state doctrine are not one and the same. The term "political question doctrine" is shorthand for the Constitutional limitation on judicial power to cases or controversies. *Baker v. Carr,* 369 U.S. 186 (1962).

In contrast, the act of state doctrine precludes adjudications which the Constitution would not prohibit the federal courts from entertaining. Thus, while the majority and dissenting opinions in *Sabbatino* differ as to how far the act of state doctrine should go in precluding judicial review of acts of foreign states, there is agreement that the doctrine—unlike the political question doctrine—is not constitutionally mandated. "The text of the Constitution does not require the act of state doctrine . . ." *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 423 (1964). Mr. Justice White's dissenting opinion was also explicit in distinguishing political questions from the act of state doctrine. By way of footnote Mr. Justice White's opinion describes as "political matters in the realm of foreign affairs within the exclusive domain of the Executive Branch", issues as to "the territorial boundaries of a foreign state." 376 U.S. 398, 461, n.20.

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*(footnote continued)*
the arena of foreign relations is abundantly demonstrated." 577 F.2d at 1203. The correctness of the Court of Appeals' analysis of the *Baker v. Carr* factors is manifest and needs no amplification here. Practically everything said in the petition reinforces the correctness of the ruling below by demonstrating that Occidental would have the Court run roughshod over the foreign affairs responsibilities of the Executive Branch. As previously noted, the petition would seek the violation of the studied neutrality of our foreign policy vis-a-vis the disputant sovereigns, and would even have this Court declare the juridical status of the submerged lands of more than fifty islands in the Persian Gulf, which islands are parts of the territories of an undetermined number of foreign states.

[16] The various reasons why Occidental is incorrect in its argument that the Hickenlooper amendment would apply to acts of state presented by its claim, are set forth in part II, *infra.*



Moreover, the *Sabbatino* case was a review of a decision of the courts of the State of New York. The act of state doctrine was announced as a principle of federal law binding on state as well as federal courts to preserve the monopoly of the federal government to conduct foreign relations. The Federal Constitution's limits on the extent of federal court jurisdiction are not the same as substantive rules of law applied in state courts.

In limiting the scope of *Sabbatino,* therefore, the Hickenlooper Amendment did not expand the subject matter jurisdiction of the federal courts.

## II. THE DECISION BELOW IS INDEPENDENTLY SUPPORTED ON GROUNDS UPON WHICH THE COURT OF APPEALS DECLINED TO RULE.

### A. The Act of State Doctrine Precludes Inquiry into the Acts of Foreign States Called into Question by This Action.

#### 1. The Acts Of Sharjah, Iran, Umm Al Qaywayn and The United Kingdom Are Called Into Question.

Occidental claims title and right to the oil on the ground that Umm Al Qaywayn had the valid claim to the disputed area when it granted Occidental a concession in 1969. Occidental alleges that Umm Al Qaywayn's notice of termination was invalid on the ground that Umm Al Qaywayn's sovereignty over the area was suspended in fact, as a result of the various alleged acts of Sharjah and Iran described in the Complaint.

The complaint would have the court determine that the cause of Iran's claim to the island of Abu Musa was an inducement by Buttes and Sharjah, "purely for the purpose of interfering with plaintiff's vested right . . ." (Complaint, ¶ FIFTEENTH, App. 9.) It would have the court declare that Iran and Sharjah annexed the territory of another foreign state; that Occidental's absence of possession and lack of drilling since June of 1970 was forced upon it by reason of a directive from Umm Al Qaywayn and by reason of British Royal Navy

interdiction of Occidental's tug and drilling rig; that Umm Al Qaywayn was acting under the direction of the British Political Agent; and that the motivation of the British Navy was to discharge Great Britain's treaty obligations.

The complaint charged that the so-called annexation, "constitutes a confiscation of plaintiff's property rights in violation of international law." (Complaint, ¶ TWENTY-SECOND, as amended by SUPPLEMENTAL AND AMENDED COMPLAINT, App. 14, 19.)

District Judge Hunter's description of the complaint is most apt: "The entire fabric of the complaint is woven out of attacks on the validity of, or questioning the reasons for, the acts of Sharjah, Iran and Umm [Al Qaywayn] with respect to the precise rights which plaintiff asserts." (App. 337-38, 396 F.Supp. at 469.)

**2. The Act Of State Doctrine Bars Inquiry Into the Acts of State Called into Question By The Complaint.**

In *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 416 (1964), this Court referred to the "classic American statement" of the act of state doctrine found in *Underhill v. Hernandez,* 168 U.S. 250 (1897), where Chief Justice Fuller said for a unanimous court (168 U.S. at 252):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Our courts have consistently refused to be drawn into questioning the acts of foreign states. *American Banana Co. v. United Fruit Co.,* 213 U.S. 347 (1909). In *Ricaud v. American Metal Co.,* 246 U.S. 304, 309 (1918), the Court stated:



> It is settled that . . . the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory . . .

This Court's most recent decision on the act of state doctrine is *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682 (1976). The court requested and heard argument on the question of whether the Court's holding in *Sabbatino* should be reconsidered. The case was disposed of without reaching the *Sabbatino* issue because five members of the Court held that the action at issue—a statement by counsel for an agency of the Republic of Cuba that this agency would refuse to return certain monies owed to an importer—was not proof of an act of state. (Opinion of the Court, delivered by Mr. Justice White, Parts I, II, 425 U.S. at 684-695). Three of this majority (The Chief Justice, Mr. Justice Powell, and Mr. Justice Rehnquist) joined in Part III of Mr. Justice White's Opinion, which would limit the scope of *Sabbatino,* so as not to apply the act of state doctrine to acts committed by foreign sovereigns "in the course of their purely commercial operations." 425 U.S. at 706. Mr. Justice Stevens concurred only as to Parts I and II of Mr. Justice White's Opinion. 425 U.S. at 715. According to Mr. Justice Marshall's dissenting opinion, joined by Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Blackmun, 425 U.S. at 715-737, the action in question qualified as an act of state within *Sabbatino,* and the *Sabbatino* rule should not be restricted to exclude "commercial" acts. No member of the Court advocated complete abolition of the act of state doctrine. That doctrine, as viewed by every member of the Court, would embrace the acts of state in question here. First, the acts of Iran, Sharjah, Umm Al Qaywayn and the United Kingdom are acts of sovereigns. Second, the acts of sovereigns in claiming their territories and exercising sovereign rights to their seabed minerals are not purely commercial acts. Finally, this is surely a case, as envisaged by Mr. Justice Powell, where "an exercise of jurisdiction would interfere with delicate foreign relations con-

ducted by the political branches . . ." 425 U.S. at 715, quoting from Mr. Justice Powell's concurring opinion in *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 775-776 (1972).

A case in point is *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D. Cal. 1971), *aff'd* 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972), where the Court of Appeals affirmed the judgment of dismissal for the reasons stated by District Judge Pregerson below. Judge Pregerson held that the complaint by Occidental called into question acts of state [many of which are challenged here] as a necessary predicate to establishing a right to the same oil concession off the island of Abu Musa.

To the same effect is *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), *cert. denied* 434 U.S. 984 (1978). The court held that it could not, consistent with the act of state doctrine, entertain a count of a complaint questioning reasons for the acts of Libya in reducing oil production of an American petroleum entrepreneur, in shutting off his supply, and in nationalizing his property. The court described an inquiry by the American judiciary into the "subtle and delicate issue of the policy of a foreign sovereign", as a "Serbonian Bog." 550 F.2d at 77.

The judgment below would have been correctly decided on act of state grounds if the Court of Appeals had reached that issue.

### 3. The Hickenlooper Amendment Does Not Permit Inquiry Into The Acts Of States Called Into Question In This Case.

The Hickenlooper Amendment to the Foreign Assistance Act of 1964 (sometimes called the "Sabbatino" amendment), 22 U.S.C. §2370(e)(2), is a careful Congressional declaration of a limited exception to the act of state doctrine.

The amendment was designed to overturn in part *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), which held that the courts of the United States would not inquire into the validity under Cuban law of acts of expropriation by the Castro government. An account of the legislative history of the



Hickenlooper Amendment is given in *Banco Nacional de Cuba v. First National City Bank*, 431 F.2d 394, 399-402 (2d Cir. 1970), *judgment vacated and case remanded for consideration of State Department letter*, 400 U.S. 1019 (1971), *adherence to prior decision announced*, 442 F.2d 530 (2d Cir. 1971), *reversed and remanded on non-Hickenlooper grounds*, 406 U.S. 759 (1972), *rehearing denied*, 409 U.S. 897 (1972).

#### a. The Hicklenlooper Amendment Does Not Apply To The Alleged Refusal Of Iran And Sharjah To Recognize Occidental's Concession.

Occidental alleges that Sharjah and Iran's refusal to recognize Occidental's concession constituted a confiscation, the premise being that Occidental had property which could be recognized. That premise is false. *First*, Occidental could get no better title than its grantor, Umm Al Qaywayn, had. Whether Occidental had property demands on whether, when it received the concession, Umm Al Qaywayn had property to convey. But whether Umm Al Qaywayn had any property to convey is itself a question which the court cannot resolve because of the political question doctrine and the act of state doctrine. *Second*, it is well settled, as the Court of Appeals noted, that interests conferred by a sovereign in lands which are claimed by another sovereign are taken subject to resolution of the boundary dispute between the sovereigns. 557 F.2d at 1202. *Poole v. Fleeger*, 36 U.S. (11 Pet.) 185 (1837); *Garcia v. Lee*, 37 U.S. (12 Pet.) 511, 521 (1838) and *Coffee v. Groover*, 123 U.S. 1, 29-30 (1887).

The cases cited above show that a title to land conveyed by a *de facto* sovereign in an area in dispute does not bind the succeeding sovereign. If it is determined that the territory belongs to the succeeding sovereign, the grant is invalid because the *de facto* sovereign could convey no better title than it had.

Moreover, Occidental has stated that the annexation of the disputed area is an accomplished fact. Whether one characterizes the event as an "annexation," as Occidental does, or simply as the manifestation of authority over land always owned, it is

clear that the three states involved have resolved their differences to the extent of allowing respondents to proceed. This is a classic example of one of the rules of *Poole v. Fleeger,* i.e., that when the states resolve a boundary dispute among themselves, they can rightfully decide which titles to recognize among those conferred during the period of the dispute.

Occidental's attempt to invoke Hickenlooper fails because it does not violate international law for sovereigns, in settling their disputes as to boundaries, to recognize the title of the grantee of one state rather than the title of the grantee of another. As a matter of law, the foreign disputant states' recognition of respondents as the grantee does not constitute a confiscation in violation of international law.

**b. The Hickenlooper Amendment Does Not Apply to an Alleged Confiscation of Contract Claims.**

The Hickenlooper Amendment is not applicable to alleged confiscations of contract claims, but only to claims to "property." By Section 301(d) (2) of Public Law 89-171 (September 6, 1965), Congress revised the 1964 Hickenlooper Amendment by inserting the words "to property" in two sections, in order to clarify the word "right." 79 Stat. 6659 (1965). The statute was changed to require "a claim of title or other right to property." (Emphasis added.)

With respect to the 1965 modification, *French v. Banco Nacional de Cuba,* 23 N.Y.2d 46, 61-62, 295 N.Y.S. 2d 433, 448 (1968) stated:

> . . . Congress decided to eliminate *all* contract claims from the statute rather than attempt the more subtle task of distinguishing between contract cases in which the act of state defense might be asserted and those in which it might not. Judge Keating may disapprove of Congress' choice of a method for accomplishing its purpose, but that choice — by the plain evidence of the 1965 amendment and of the accompanying Senate Report — is the one that was made, and it is binding upon us.



The Hickenlooper Amendment is not, as Occidental urges, a judicial warrant to inquire into alleged confiscations of contractual claims by acts of state.

**B. Civil Action No. 74-868 Was Not Cognizable Under the Court's Admiralty Jurisdiction.**

Occidental had styled Civil Action No. 74-868 as arising within admiralty jurisdiction. The district court ruled that regardless of how the matter was denominated, the suit was in fact initiated to establish title to a cargo of crude oil, and thus alien to traditional maritime interests. The *sine qua non* of an action in admiralty with respect to cargo is the existence of a maritime port or contract.

There is no allegation of any contractual relationship between Occidental and any of the respondents, and a concession for the drilling for oil cannot be considered a maritime contract. See *Silver v. Sloop Silver Cloud,* 259 F.Supp. 187, 190 (S.D.N.Y. 1966), citing *General Engine & Machine Works, Inc. v. Slay,* 222 F.Supp. 745, 747 (S.D.Ala. 1963). Admiralty jurisdiction, if it were applicable here, would have to rest on the existence of a maritime tort.

Conversion is the sole tort alleged in the complaint, viz; the oil was "wrongfully and tortiously taken" (Complaint, ¶ SECOND, App.2).

The facts do not support maritime tort jurisdiction. The alleged conversion did not take place on navigable waters and was not of a traditional maritime nature. The cargo in issue is crude oil produced from the subsoil below the seabed, and the equipment used in producing this oil was located on a fixed platform with legs imbedded deep into the soil beneath the Persian Gulf. As found by the District Court, the alleged conversion was not of a traditional maritime nature.

The admiralty action was therefore properly dismissed by the District Court.

### C. The Judgment Below Is Correct Because of The Absence of Iran, Sharjah and Umm Al Qaywayn, Which Are Indispensable Parties.

Respondents' oil concession was granted by Sharjah and consented to by Iran, each of which claims the territory and receives one-half of the payments for oil production. The third claimant to the territory, Umm All Qaywayn, shares in Sharjah's revenues from the production of oil. The relief sought by Occidental would vitiate respondents' concession agreement. The relief sought would therefore materially affect three foreign states, none of which is joined as a party.

Rule 19 of the Federal Rules of Civil Procedure sets forth criteria for determining when, in the absence of a party (Fed.R.Civ.P. 19(a)) "in equity and good conscience the action would proceed among the parties before it . . ." (Fed.R.Civ.P. 19(b)).

The guidelines provided by Rule 19 are based upon the principle of *Shields v. Barrow*, 58 U.S. (17 How.) 130, 141 (1855) that "a circuit court can make no decree . . . between the parties before it, which so far involves or depends upon the rights of an absent person" without the joinder of that person.

The principle stated in these treatises is exemplified by *Lawrence v. Sun Oil Co.*, 166 F.3d 466, 469-70 (5th Cir. 1948) where, in a suit between oil land lessees, the absence of their respective lessors was held fatal because the lessors were indispensable parties. To like effect is *Schutten v. Shell Oil Co.*, 421 F.2d 869 (5th Cir. 1970) (A suit to evict an oil operator and for an accounting).

Occidental's attack on the validity of the concession agreement prejudices the interests of Sharjah, Iran and Umm al Qaywayn, and equity and good conscience require dismissal of these actions because of their non-joinder.[17]

[17] Occidental's suggestion (Pet. 24, n. 17) that the relief it seeks—recovery of oil extracted—would not challenge "present sovereignty is specious. The sovereigns' ability to give clear title would be impaired by such relief.



### D. The Judgment Below Is Correct Because The Instant Action Is Barred by Operation of Res Judicata.

Occidental seeks a determination that it had the right to explore and exploit the oil field off the coast of Abu Musa, and a further determination that the respondents interfered with Occidental's enjoyment of that right. In the California action, Occidental sought to establish the same right, and to establish that the same alleged conduct of respondents was an interference with such right[18]. In the California action, the respondents' conduct was alleged to be a statutory tort under the federal antitrust laws, and in the instant action it is alleged to be the tort of conversion—under admiralty law in the libel action and under an undisclosed source of law in the diversity actions. In regard to the similarity of the two actions, the Court of Appeals stated that, "The appellants' and appellees' predecessors have once before litigated the underlying basis of this dispute," citing the prior federal court action in California.

If the court had jurisdiction, the application of the doctrine of *res judicata* would have been required, because the instant action and the prior action assert the same cause.

In *Stevenson v. International Paper Co.*, 516 F.2d 103, 109 (5th Cir. 1975), the process of comparing causes of action was described as follows:

> [v]arious tests have been advanced, including Is the same right infringed by the same wrong? Would a different judgment obtained in the second action impair rights under the first judgment? Would the same evidence sustain both judgments?

[18] In the California action, the right which Occidental asserted—an exclusive right to explore and exploit submerged lands off Abu Musa—is described in its Complaint, ¶ 12, Prayer (App. 375-6, 391-2); California District Court, Plaintiff's Memorandum of Points and Authorities, 20 (App. 609). The wrong asserted in the California action—depriving Occidental of enjoyment of the concession rights—is described in its Complaint, ¶¶ 21, 22, 26 (App. 380-85, 396); California District Court, Plaintiff's Memorandum of Points and Authorities, 26 (App. 612-13).

When measured by each of these three tests, the substance of the instant action and the California action is the same.[19]

**1. The Same Right Is Infringed By the Same Wrong.**

That test was stated in *Baltimore Steamship Co. v. Phillips,* 274 U.S. 316, 321 (1927), as follows:

> A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong.

The substance of the instant action and the California action is the same. The same right is asserted in each — a concession contract with Umm Al Qaywayn to explore and exploit its Persian Gulf oil resources for forty years. The same conduct of respondents is alleged in each — inducing Sharjah and Iran to claim the area and thereby to deprive Occidental of its concession right. The two actions differ only in the labels fixed to the conduct: antitrust tort in the California action and conversion tort in this action. Judged by the same right and wrong test, the instant action should be barred by *res judicata.*

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[19] The result would be the same in the courts of Louisiana, which would regard the actions as petitory. *Allison v. Maroun,* 193 La. 286, 190 So. 408 (1939); *Ramos Lumber & Mfg. Co. v. Labarre,* 116 La. 559, 570-573, 40 So. 898, 902 (1906); See also *Lawrence v. Sun Oil Co.,* 166 F.2d 466, 470 (5th Cir. 1948). The Louisiana Courts would apply the rule that in petitory actions the parties "must set up whatever title or defense they have at their command, or a judgment on that issue will bar a second action based on a right or claim which existed at the time of the first suit, even though omitted therefrom." *Hope v. Madison,* 194 La. 337, 193 So. 666 (1940). See also *Quarles v. Lewis,* 226 La. 76, 81-84, 75 So.2d 14, 16 (1954); *Succession of Whitner,* 165 La. 769, 771-776, 116 So. 180, 181-2 (1928); *Maher v. New Orleans,* 371 F.Supp. 653, 659-70 (E.D.La. 1974), *aff'd,* 516 F.2d 1051 (5th Cir. 1975).



**2. A Different Judgment Here Would Impair Rights Under The California Judgment.**

A judgment here other than one for respondents would result in a trial of the validity of and reasons for the acts of Iran, Sharjah, Umm Al Qaywayn, and Great Britain. The decision in California, dismissing the action on act of state grounds, was rendered precisely to foreclose and prevent such litigation.

**3. The Same Evidence Would Sustain Both Judgments.**

This test is answered by examining the record in the two proceedings. In each, Occidental seeks a declaration that the same conduct of respondents is wrongful, i.e., allegedly inducing Sharjah and Iran to claim Abu Musa so as to deprive Occidental of enjoyment of the concession right. The "evidence" supporting the judgment in the California action was Occidental's complaint, which on its face required forbidden inquiry into acts of state. The "evidence" here is Occidental's complaint which likewise on its face requires a judicial inquiry into many of the same acts of state.

Each of the three same-cause-of-action tests results in a bar of the instant action.

**E. The Judgment Below Is Correct Because Occidental Is Collaterally Estopped from Raising Outcome—Determinative Issues Decided Against It in the California Action.**

Collateral estoppel prevents relitigation of all issues that have been litigated in a prior proceeding, whether or not the causes of action are the same. *International Association of Machinists & Aerospace Workers v. Nix,* 512 F.2d 125 (5th Cir. 1975). For purposes of this discussion only, it is assumed that the prior action and this action somehow do not assert the same cause of action.

For an issue to be concluded by collateral estoppel, that issue must have been the same as the one raised and litigated in the prior action; the issue must have been material and relevant

to the disposition of the prior action; and the determination of the issue in the prior action must have been necessary and essential to the resulting judgment. See *Parker v. McKeithen,* 488 F.2d 553, 557-558 (5th Cir. 1974); *Seguros Tepeyac, S.A., Compania Mexicana v. Jernigan,* 410 F.2d 718 (5th Cir. 1969); *Hyman v. Regenstein,* 258 F.2d 502, 510-11 (5th Cir. 1958), *cert. denied sub nom. Hyman v. Continental Illinois National Bank,* 359 U.S. 913 (1959); 1B Moore, *Federal Practice* ¶ 0.443[1] at 3901 (2d ed. 1974).

Mutuality of estoppel is not required. *Cheramie v. Tucker,* 493 F.2d 586, 589, n.10 (5th Cir. 1974), *cert. denied,* 419 U.S. 868 (1974). The question for purposes of collateral estoppel is whether an issue, the resolution of which is material to the outcome of the instant action, was necessarily decided in the prior one.

Judge Pregerson read the complaint in the prior California action as requiring an adjudication of the acts of state alleged in the pleadings, of Iran, Sharjah, Umm Al Qaywayn and Great Britain. These allegations, according to Judge Pregerson, "would form an integral part of plaintiffs' case" (331 F.Supp. at 112). Judge Pregerson also held that the action alleged that plaintiffs were "deprived of the enjoyment of their concession only by the cooperative effect of a number of acts of state, of which Sharjah's claims were not the most efficacious." (331 F.Supp. at 112.) Thus, the complaint in the prior action was read as calling into question the reasons for and the validity of the acts of the four states in allegedly preventing Occidental from enjoying its concession. The decision in that action was that the act of state doctrine barred the inquiry and that the Hickenlooper exception did not apply.

The Court of Appeals for the Fifth Circuit did not reach this issue. If the issue were reached, Occidental would be estopped from again calling into question the acts of state it challenged before. Occidental would also be estopped from again raising the issue as to whether the Hickenlooper Amendment applied to the acts of state it calls into question.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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# APPENDIX A

No. 75-3088

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCCIDENTAL OF UMM AL QAYWAYN, INC.,
*Plaintiff-Appellant*

v.

CITIES SERVICE OIL CO., ET AL.,
*Defendants-Appellees*

(Consolidated with)

OCCIDENTAL OF UMM AL QAYWAYN, INC.,
*Plaintiff-Appellant*

v.

KERR-MCGEE CORPORATION,
*Defendant-Appellee*

(Consolidated with)

OCCIDENTAL OF UMM AL QAYWAYN, INC.,
*Plaintiff-Appellant*

v.

A CERTAIN CARGO LADEN ABOARD
"DAUNTLESS COLOCOTRONIS,"
*Defendant-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

## BRIEF FOR THE UNITED STATES, *AMICUS CURIAE*

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# INDEX

## CITATIONS

## QUESTION PRESENTED

Whether the Act of State Doctrine or some other doctrine bars the adjudication of a controversy between private parties requiring determination of a boundary dispute between foreign nations.

## INTEREST

Noting that this case impacts on the Executive Branch, this Court requested the views of the United States.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The facts in this case are many and complex and are fully set out in the opinion of the district court and in the briefs of the parties before this Court. 396 F.Supp. 461, 464-466; Original Brief on Behalf of Occidental Of Umm Al Qaywayn, Inc., Plaintiff-Appellant (hereinafter Pl.-Appellant Br.), pp. 2-13; Original Brief on Behalf of Cities Service Oil Company, et. al., Defendants-Appellees (hereinafter Defs.-Appellees Br.), pp. 1-14.

This case concerns rights to oil extracted from the seabed of the Persian Gulf in an area located 9 miles off the island of Abu Musa, approximately 40 miles from the shores of the Trucial Sheikhdoms, Umm Al Qaywayn and Sharjah are two neighboring sheikhdoms located on the southeastern coast of the Persian Gulf. Iran is located on the northern side of the Persian Gulf. The island of Abu Musa is located in the Persian Gulf between these three nations. The appellant claims title to this oil pursuant to a concession from Umm Al Qaywayn, contending that its rights to the oil under that concession were illegally confiscated by Sharjah and Iran. Appellees claim title to the oil pursuant to a concession from Sharjah that has apparently been recognized by Iran.

Appellees argue that summary judgment is required in these proceedings on a number of grounds. However, as both the district court and the parties apparently recognize, the principal issue in this litigation is whether Umm Al Qaywayn possessed sovereign rights in the granted appellant's concession in November of 1969. Appellees argue that in order to decide this issue, the Court must resolve a dispute among Umm Al Qaywayn, Sharjah and Iran regarding sovereignty over that area of the seabed.[1] Appellees argue further that the application of the Act of State Doctrine or some other doctrine bars adjudication in our courts of a boundary dispute between foreign nations. Although the district court refused to recognize any special doctrine that restrains a court from deciding a case involving the rights of private parties where the adjudication of those rights requires the determination of such a boundary dispute, it concluded that the Act of State Doctrine applies to bar a resolution of such cases.

It is the position of the United States that the resolution of foreign boundary disputes does not implicate the Act of State Doctrine but that, nonetheless, the Court should not adjudicate this boundary dispute either because the dispute presents a nonjusticiable political question or because there exists a special doctrine restraining the courts from adjudicating such disputes.

## ARGUMENT

### I

### THE RESOLUTION OF A BOUNDARY DISPUTE BETWEEN FOREIGN NATIONS RAISES A NONJUSTICIABLE POLITICAL QUESTION

The district court refused to recognize any special doctrine that restrained the courts from deciding a case involving the

[1] This dispute stems on the one hand from a controversy between Umm Al Qaywayn and Sharjah over a 1964 seabed agreement between them and a subsequent extension by Sharjah of its territorial sea adjacent to Abu Musa and, on the other hand, from a controversy between Sharjah and Iran over ownership of Abu Musa. Iran claims that it owns the island and as a consequence has sovereignty over the disputed seabed, either as part of its 12-mile territorial sea or part of the continental shelf appertaining to the island.



adjudication of a boundary dispute between foreign nations. Instead, the court concluded that where resolution of the boundary dispute requires inquiry into the authenticity and motivations of the acts of the foreign nations, the Act of State Doctrine bars adjudication of the controversy.

The classic American statement of the Act of State Doctrine is found in *Underhill* v. *Hernandez,* 168 U.S. 250:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Notably, the Act of State Doctrine applies only to the public acts of a recognized foreign nation having effect within the territory of that nation. *Pasos* v. *Pan American Airways,* 229 F.2d 271 (1956); *Banco de Espana* v. *Federal Reserve Bank of New York,* 114 F.2d 438 (1940); *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1963); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 293 F.Supp. 892 (1968). In those cases where the acts did not purport to take effect within the foreign nation, the courts have not applied the Doctrine to bar examination into the validity of those acts. *Zwack* v. *Kraus Bros. & Co.,* 237 F.2d 255 (1956); *Estonian State Cargo & Passenger S.S. Line* v. *United States,* 116 F.Supp. 417, 126 C.Cls. 809 (1953); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 293 F.Supp. 892 (1968); *Republic of Iraq* v. *First National City Bank,* 241 F.Supp. 567 (1965); *F. Palicio y Compania S.A.* v. *Brush,* 256 F.Supp. 481 (1966), aff'd in part, rev'd in part on other grounds, 485 F.2d 1371, rev'd on other grounds, 425 U.S. 682. However, in the case of a boundary dispute, the relevant acts are the acts of two or more nations, all of which are intended to have effect within the same area, the

disputed territory. The Act of State Doctrine applies only to the acts of the nation having sovereignty over the disputed area—not to the acts of other nations. Consequently, before a court can decide whether the Act of State Doctrine is applicable to bar and examination of any of these acts, it must resolve the boundary dispute.[2] *Williams* v. *Suffolk Ins. Co.*, 38 U.S. 225 (1839); *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1908). Moreover, application of the Act of State Doctrine to a boundary dispute is impractical because the Doctrine requires the Court to give a conclusive presumption of validity to the acts of the foreign nations and rule accordingly.[3] *Ricaud*

[2] In *Williams* v. *Suffolk Ins. Co.*, the Supreme Court was called upon to examine the validity of a seizure of two fishing vessels by Argentina for purposes of resolving insurance claims for the value of the vessels. Argentina claimed that the waters were within its territory. If they were, the Act of State Doctrine would bar examination into the validity of the seizures. The Court, based on an Executive Branch determination that the waters within which the vessels were seized were not within the territory of Argentina, concluded that the Act of State Doctrine did not apply to the seizures and went on to determine that the seizures were illegal and contrary to the law of nations. 38 U.S. 225 (1839). In *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1908), the Court was called upon to examine the motives of Costa Rica in seizing a plantation in order to determine a private antitrust action brought by one private company against another. In order to determine whether the Act of State Doctrine applied so as to bar an examination into the motives of Costa Rica, the Court had to determine whether the seizure occurred within the territory of Costa Rica. It was argued that the plantation was located in a part of Panama unlawfully occupied by Costa Rica. The Court concluded, apparently on the basis of an Executive Branch determination (213 U.S. 347, 358), that Costa Rica was sovereign over the area in question and that the Act of State Doctrine applied to bar an examination of the motives of Costa Rica in seizing the plantation.

[3] Thus, as the Supreme Court held in *Ricaud* v. *American Metal Co.*, the Act of State Doctrine "does not deprive the courts when it is made to appear that the foreign government has acted in a given way on the subject matter of the litigation, the details of such action cannot be questioned but must be accepted by our courts as a rule for decision." In that case, the Court held that the validity of the foreign seizure therein involved could not be questioned and "that the title to

*(footnote continued)*



v. *American Metal Co.*, 246 U.S. 304 (1918); *Banco Nacional de Cuba Sabbatino*, 376 U.S. 398 (1963). It does not, in our view, require the Court to abstain from ruling on the validity of the acts, as was done by the district court in these proceedings. Thus, the application of the Act of State Doctrine to a boundary dispute would require the Court to treat conflicting acts of state having effect in the same territory (in this case the conflicting claims of Umm Al Qaywayn, Sharjah and Iran) as valid. For this reason, the Act of State Doctrine does not and cannot apply to the resolution of a boundary dispute between foreign nations. This is not to say, however, that no other doctrine exists which restrains the courts from adjudicating such disputes. It is the position of the United States that the Political Question Doctrine bars the courts from adjudicating boundary disputes between foreign nations.

The Supreme Court has recognized that there is a class of questions, the resolution of which was left by the Constitution, not to the courts, but to the other branches of Government. These questions are generally described as political questions. Although we have uncovered no case in which the Supreme Court has specifically held that cases involving boundary disputes raise nonjusticiable political questions, the court has suggested this in dicta. *United States* v. *Texas*, 143 U.S. 621, 638-639 (1892); *Rhode Island* v. *Massachusetts*, 37 U.S. 657, 744-745 (1838). For example, Justice White dissenting in *Banco Nacional de Cuba* v. *Sabbatino*, stated:

*(footnote continued)*

the property in the case *must be determined* by the result of the action taken by the foreign authorities." (Our emphasis.) In *Banco Nacional de Cuba* v. *Sabbatino*, the Court held that the Act of State Doctrine barred inquiry into the validity of the foreign act of confiscation and remanded the case to the district court, requiring the court to adjudicate the matter, giving a conclusive presumption of validity to the act of confiscation. 376 U.S. 398, 439. The Court in that case described the Act of State Doctrine as a "principle of decision" (376 U.S. 398, 427), and referred to "the presumed validity of the expropriation." 376 U.S. 398, 472.

> * * * without doubt political matters in the realm of foreign affairs are within the exclusive domain of the Executive Branch, as, for example, issues for which there are no available standards or which are textually committed to the executive * * *. These issues include * * * the territorial boundaries of a foreign state, * * *. 376 U.S. 398, 461.[4]

Although the district court rejected the argument that the resolution of the foreign boundary dispute under the circumstances of this case raises a nonjusticiable political question, another court in a private antitrust action arising out of the same circumstances concluded that it does. In *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F.Supp. 92, aff'd 461 F.2d 1261, the court was asked to dismiss the complaint, in part, in the ground that the complaint demanded the court to decide the boundary dispute. The court held that the complaint did not require such an adjudication but concluded in passing that:

> The determination of foreign states' boundaries is certainly not a permissible function of this court. In our system, the questions of what are a country's boundaries, or of what nation has sovereignty over a certain piece of territory, are not for the judiciary to decide; they are political questions, upon which the courts must be guided and bound by pronouncements of the executive. * * * Authoritative judicial resolution of international boundary disputes is a function not of domestic courts, but of international tribunals,

[4] There is dicta in *Williams* v. *Suffolk Ins. Co.*, to the effect that the court might inquire into the sovereignty over disputed territory in the absence of a political branch determination on that question. However, the Executive Branch had made a determination as to sovereignty over the territory in question in that case and the court gave conclusive weight to that determination. *Williams* v. *Suffolk Ins. Co., supra,* pp. 228-229.



> acting upon the consent of the contestant states. * * * (Citations omitted, 331 F.Supp. 92, 103.)[5]

It is the position of the United States that the determination of boundary disputes between foreign nations frequently raises a nonjusticiable political question and that, in any event, the determination of the boundary dispute in this case raises such a question.

The Supreme Court has stressed that the determination that a particular question constitutes a political question requires the concrete evaluation of the circumstances of each case in terms of several factors it has identified as bearing upon that determination. *Baker* v. *Carr,* 369 U.S. 186, 210-211, 217 (1961). One of the factors identified by the court is the impossibility of a court undertaking independent resolution without expressing lack of respect due coordinate branches of Government. *Baker* v. *Carr, supra,* p. 217. Another factor identified by the court as particularly relevant to questions bearing on the conduct of the Nation's foreign relations is the possible consequences of judicial handling. *Baker* v. *Carr, supra,* p. 211. It is the position of the United States that the adjudication of the boundary dispute raised by these proceedings, where the United States has declined to take a position regarding the dispute, would not only express a lack of respect due the Executive Branch in the conduct of the foreign relations of the Nation but would, moreover, ignore the potential adverse consequence of such actions to the foreign relations interests of the Nation.

As the Record in this case suggests, the United States Government has recognized that there exists a dispute as to the ownership of the Persian Gulf island which is the basis of the boundary dispute in this case and has indicated that it does not propose to take a position regarding the claims of the nations

[5] The court concluded that the complaint sought essentially to prove a conspiracy and that proof of that conspiracy required an examination into the motives behind certain public acts of the disputing nations which was forbidden by the Act of State Doctrine and dismissed the complaint on that ground. 331 F.Supp. 92, 107-114.

involved. Appendix, Vol. I, pp. 194-205. More specifically, the Department of State has expressly advised in connection with this litigation that there is a need for unquestionable neutrality by the United States with regard to territorial disputes between foreign nations and that "it would be potentially harmful to the conduct of our foreign relations interests for this court to rule on the territorial issue involved in this case." Letter of May 12, 1978, from Herbert J. Hansell, Legal Adviser, Department of State, to James W. Moorman, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Appendix.

In our view, the position which the Executive Branch has taken on the resolution of this particular boundary dispute should, under the guidelines set down by the Supreme Court for determining the justiciability of a particular question, be dispositive of this case. Nonetheless, the Supreme Court has identified other factors which, if applied to the circumstances of the case, would further support the conclusion that the resolution of this particular boundary dispute raises a nonjusticiable political question.

One of the factors identified by the Court is the possible lack of judicially discoverable and manageable standards for resolving the question. The boundary dispute between Sharjah, Iran, and Umm Al Qaywayn raises complex questions relating to the limits of the territorial sea and continental shelf of a nation under international law. While some of the standards for delimiting the territorial sea have been codified, these standards do not address the issue of the seaward extent of those seas. They address the determination of the coastline from which the limits of the territorial sea, whatever they may be, are extended. Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Pt. 2) 1606. The United Nations Conference, which adopted these standards in 1958, and a special Conference called by the United Nations 2 years later specifically for that purpose, were unable to agree upon the seaward extent of the territorial sea. 4 Whiteman, *Digest of International Law* 94-137. The issue remains unresolved to this



day and is in fact one of the principal issues being addressed at the Third United Nations Conference on the Law of the Sea. See Composite Single Negotiating Text, Art. 3, Third United Nations Conference on the Law of the Sea, United Nations Doc. A/CONF.62/WP.10. That Conference has been dealing with that and other law of the sea issues since 1970. The few international adjudications relating to a determination of the limits of a nation's jurisdiction in the adjacent seas reveal the complexity and difficulty of dealing with such an issue in the present state of international law. E.g., Fisheries Jurisdiction *(United Kingdom* v. *Iceland)*, Merits, Judgment, I.C.J. Reports 1974; Fisheries Case *(United Kingdom* v. *Norway)*, Judgment of December 19, 1951: I.C.J. Reports 1951, p. 116. Moreover, the resolution of this case implicates more than the question of the seaward extent of the territorial sea. It also implicates the delimitation of the continental shelf. The 1958 United Nations Conference, which codified standards for delimiting the territorial sea, also codified standards for delimiting the continental shelves of neighboring nations. Convention on the Continental Shelf, 15 U.S.T. (Pt. 1), 471. However, the Conference did not codify standards that specifically address the resolution of a boundary dispute. Thus, the Convention provides that continental shelf boundaries are to be determined by agreement and in the absence of agreement by the principle of equidistance, unless special circumstances justify another boundary. Convention on the Continental Shelf, *supra*, Art. 6. These principles have not proven effectual in resolving disputes over the delimitation of continental shelf boundaries. E.g., North Seas Continental Shelf Cases (Federal Republic of Germany/Denmark; Netherlands), I.D.J. Reports 1966. Nor has international law developed clear standards outside the terms of the Convention for the resolution of such disputes. North Sea Continental Shelf Cases, *supra*. See also Single Negotiating Text, Art. 83, Third United Nations Conference on the Law of the Sea, *supra*. Because of the obvious uncertainties associated with the still developing area of international law, it is the view of the United States that it would be difficult for a domestic

court to discover the international standards applicable for the determination of a dispute relating to the seaward extent of a nation's territorial waters or its continental shelf boundary with another nation.

Another factor, identified by the Supreme Court as particularly relevant to determining the justiciability of a question relating to the conduct of our foreign relations is the susceptibility to judicial handling of that question in the light of its nature and posture in the specific case. *Baker* v. *Carr,* 369 U.S. 168, 211. Initially, it is the position of the United States that the resolution of boundary disputes between foreign nations raises uniquely political considerations. That consideration aside, it is the view of the United States that there may be great difficulty in the circumstances of this case of ensuring that the evidence necessary to resolve fully and fairly the boundary dispute is between foreign sovereigns, only private litigants are before this Court. Notably, the resolution of a territorial dispute could entail an examination of the acts of the disputing nations reaching far back into history. E.g., *Minquiers and Ecrehos Case,* 1953 I.C.J. Reports.

Thus, it is the view of the United States that an examination of the circumstances of this case in terms of the factors identified by the Supreme Court for determining the justifiability of a particular question establishes that the resolution of the boundary dispute in this case presents a nonjusticiable political question.

## II

## THE COURT SHOULD ABSTAIN FROM ADJUDICATING FOREIGN BOUNDARY DISPUTES

If this Court concludes that this case does not present a political question, it is our position that the Court should, nonetheless, refrain from adjudicating this dispute, not because the Constitution commands that result, but on principles of judicial abstention. Thus, in the view of the United States,



many of the considerations underlying both the Political Question Doctrine and the Act of State Doctrine, strongly urge the recognition by the courts of a special doctrine relating to foreign boundary disputes. Under this doctrine, the courts should abstain from passing upon the validity of the public acts of foreign nations relating to a boundary dispute where the political branches of Government have "abstained" from taking a position in that dispute—rather than giving a presumptive conclusion of validity to those acts, as required by the Act of State Doctrine.

The Supreme Court has made clear that the Act of State Doctrine rests on principles of judicial abstention rather than on international law or constitutional commands, and that it thus constitutes a limited exception to the ordinary obligation of courts to adjudicate cases and controversies over which they have jurisdiction. *Banco Nacional de Cuba* v. *Sabbatino, supra,* pp. 421-423. *The Paquete Habana,* 175 U.S. 677; *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, 763 (plurality opinion). The Court has described two related considerations underlying the Doctrine: (1) the absence of settled or ascertainable legal standards by which to judge the validity of foreign acts; and (2) the risk of embarrassment or interference with the conduct of the nation's foreign relations. See *Banco Nacional de Cuba* v. *Sabbatino, supra,* pp. 427-428; *First National City Bank* v. *Banco Nacional de Cuba, supra,* p. 763 (plurality opinion), and 774 (Justice Powell's opinion). Moreover, where the act is being challenged as invalid under international law, as here, the Court has identified the following factors as bearing upon the application of the Act of State Doctrine: "the degree of codification and consensus concerning a particular area of international law," whether aspects of international law which "touch more sharply on national nerves than do others" are involved, how important the implications of an issue are for our foreign relations," whether "the government which perpetrated the challenged act of state is no longer in existence," 376 U.S. 398, 427-428. These factors are strikingly similar to the factors the court has identified as bearing

upon the application of the Political Question Doctrine. *Supra,* pp. 7-15. Our previous analysis of these factors in terms of the particular circumstances of this case demonstrates that the Court should refrain from adjudicating the foreign boundary dispute involved in these proceedings.

In the view of the United States, the considerations which led the Court to recognize a limited exception under the Act of State Doctrine to their ordinary obligation to adjudicate cases and controversies over which they have no jurisdiction, apply as well to the resolution of foreign boundary disputes. Consequently, if the Court were to conclude that the resolution of the boundary disputes in this case does not rise to the level of a political question, these same considerations warrant the recognition of a doctrine which restrains the courts from adjudicating such disputes based not on constitutional commands but on the principle of judicial abstention.

## CONCLUSION

For the foregoing reasons, the Complaint in this case should be dismissed.

Respectfully submitted,

JAMES W. MOORMAN,
*Assistant Attorney General.*

BRUCE C. RASHKOW
*Attorney, Department of Justice,*
*Washington, D.C. 20530.*

May 1978



THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

May 12, 1978

Honorable James W. Moorman
Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D.C.

Dear Mr. Moorman:

Your Division has asked for our views concerning certain aspects of the case of *Occidental of Umm Al Qaiwain, Inc. v. A certain Cargo of Petroleum Laden Aboard the Tanker "Dauntless Colocotonic," Etc., et. al., C.A. 5, No. 75-3088.*

It is our understanding that the disposition of this case would require a determination of the disputed boundary between Umm Al Qaiwain on the one hand and Sharjah and Iran on the other at the time Umm Al Qaiwain granted the concession in issue to Occidental. It is our view that it would be contrary to the foreign relations interests of the United States if our domestic courts were to adjudicate boundary controversies between third countries and in particular that controversy involved here.

The extent of territorial sovereignty is a highly sensitive issue to foreign governments. Territorial disputes are generally considered of national significance and politically delicate. Even arrangements for the peaceful settlement of territorial differences are often a matter of continued sensitivity.

These considerations are applicable to the question of Umm Al Qaiwain's sovereignty over the continental shelf surrounding Abu Musa at the time of the concession to Occidental and to the subsequent arrangements worked out

among the affected states. For these reasons, the Department of State considers that it would be potentially harmful to the conduct of our foreign relations were a United States court to rule on the territorial issue involved in this case.

We believe that the political sensitivity of territorial issues, the need for unquestionable U.S. neutrality and the harm to our foreign relations which may otherwise ensue, as well as the evidentiary and jurisprudential difficulties for a U.S. court to determine such issues, are compelling grounds for judicial abstention.

We do not believe that this judicial self-restraint should turn on such analytical questions as whether the so-called Act of State doctrine which is traditionally limited to governmental actions within the territory of the respective state can apply to an exercise of disputed territorial jurisdiction. It rather follows from the general notion that national courts should not assume the function of arbiters of territorial conflicts between third powers even in the context of a dispute between private parties. As a result, we are of the view that the court should be encouraged to refrain from setting the extent of Umm Al Qaiwain's sovereign rights in the continental shelf between its coast and Abu Musa at the time of its grant of the concession to Occidental.

Sincerely,

HERBERT J. HANSELL

## APPENDIX B

**COPY OF PAGE 34 OF DEFENDANTS' STATEMENT OF REASONS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS ACTION, IN OCCIDENTAL OF UMM AL QAYWAYN, INC. v. A CERTAIN CARGO OF PETROLEUM LADEN ABOARD THE TANKER "DAUNTLESS COLOCOTRONIS", CIV. NO. 74-868, W.D.LA., LAKE CHARLES DIVISION (FILED NOV. 6, 1974)**

409 U.S. 950, 93 S.Ct. 272 (1972). One passage in that case, which we have already quoted, bears repetition here:

> "Regardless of the wording of the complaint, it would be conceptually and prudentially hazardous to treat the territorial waters claims of Sharjah as a "confiscation," subject to adjudication under the international legal standards governing that kind of act. Claims to territory are a different matter from the expropriation of corporate property within or appertaining to that territory. (citation omitted). Moreover, territorial waters claims are subject to a body of international law wholly different from that relating to expropriations." (Citations omitted)

Inasmuch as the action requires an inquiry barred by the act of state doctrine, it fails to state a claim upon which relief can be granted, and must be dismissed.

**B. The Action Should be Dismissed Because it Would Require Adjudication of a Boundary Dispute Between Foreign Nations, Which This Court Lacks Jurisdiction to Make.**

Plaintiff claims the oil at issue herein on the basis of its claim of exclusive right, under a concession from Umm Al Qaywayn to exploit the oil resources of the precise area from which the oil was produced by Buttes and its joint venturers, under a concession agreement from Sharjah. The two concession agreements overlapped, as the complaint indicates, because there is an overlap between Umm Al Qaywayn's continental shelf claim to the area, and Sharjah's territorial sea and continental shelf claims to the area. Iran also has made a

territorial sea claim to the area. The complaint makes no claim that Umm Al Qaywayn and Sharjah have resolved this dispute as to the location of their common boundary, or that Iran's claim has been resolved with Umm Al Qaywayn, or even that Umm Al Qaywayn continues to claim ownership of the area.

If the disputed area is not within Umm Al Qaywayn's boundaries plaintiff will have been deprived of none of the oil resources in the disputed area because it will have been entitled to none. For

34 (Continued)

## APPENDIX C

**COPY OF PAGE 27 OF DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS OR FOR SUMMARY JUDGMENT, IN OCCIDENTAL OF UMM AL QAYWAYN, INC. v. A CERTAIN CARGO OF PETROLEUM LADEN ABOARD THE TANKER "DAUNTLESS COLOCOTRONIS," CIV. NO. 74-868, W.D.LA., LAKE CHARLES DIVISION FILED APR. 4, 1975**

"continental shelf" as referring:

> (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres of, beyond that limit, to where the depth of the superjacent waters admits of the exploration of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

And Article 2 provides:

> 1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
>
> 2. *The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.*
>
> 3. *The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.*
>
> 4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at

the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil. (Emphasis added).

Thus neither Sharjah nor Iran had to make express claims of continental shelf rights for Abu Musa. Their long-standing claims to the Island were by themselves sufficient to manifest their claims for its adjacent continental shelf.

It should also be noted that Occidental's assertion that the boundary dispute did not arise until after it received a concession and discovered a prospect of oil (Plantiff's Brief, p. 16) makes approximately November 18, 1969 (the date on which Occidental was granted its concession) as the latest date on which, in Occidental's estimation, Sharjah could have asserted a timely claim to

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

**No. 78-910**

OCCIDENTAL OF UMM AL QAYWAYN, INC.,

*Petitioner,*

—v.—

CITIES SERVICE OIL CO., *et al.*,

*Respondents.*

## PETITIONER'S REPLY MEMORANDUM

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*Respondents.*

## PETITIONER'S REPLY MEMORANDUM

Three decisive points of law made in the Petition are not challenged in the respondents' Brief in Opposition:

1. The three-mile limit to the territorial sea of nations is a rule of law proclaimed by the United States and binding on American courts.
2. This rule of law applies to the island of Abu Musa, regardless of who owned that island.
3. Disputes concerning this rule of law are justiciable under Article III of the United States Constitution.

It is therefore conceded as a matter of law that Occidental's oil find, located nine miles from Abu Musa, was and is outside the territorial sea of respondents' grantors.

This conclusion alone requires reversal of the Court of Appeals because its demonstrates that there is a justiciable issue and that there is no "Political Question".

Confronted with this simple logic, the respondents have attempted to evade the law. They advance the fanciful and extravagant assertion that the island of Abu Musa, which is not much bigger than Central Park, has a continental shelf of its own, radiating beyond its territorial sea. This invention exists only in the imaginings of the respondents. It is inconsistent with every fact of this case, and it is contrary to every applicable principle of international law and usage, applied in the Persian Gulf and throughout the world.

• • •

In a substantive sense, the respondents have defaulted. To fill the vacuum they resort again to irrelevant diversions, steeped in complexity, which have not disserved them thus far. We cannot therefore ignore them. Lest our engagement with false issues and erroneous statements blur the focus of the real, simple issues, we answer them in a separate section under the heading APPENDIX.

## I.

## THE SEIZURE OF OCCIDENTAL'S OIL FIND WAS BASED SOLELY ON THE ILLEGAL EXTENSION OF THE 3 MILE TERRITORIAL WATER LIMIT TO 12 MILES AND NOT ON ANY NOTION OF CONTINENTAL SHELF.

The facts of this case simply will not support the notion that the tiny island of Abu Musa had continental shelf rights extending beyond its territorial waters. This is not a case of mere failure of the sovereigns to assert continental shelf rights, as the respondents would have the Court believe. The facts are utterly irreconcilable with respondents' suggestion. In the understanding of the sovereigns and of Buttes itself, Abu Musa had no such continental shelf rights. The only basis for seizure of Occidental's oil find was the illegal extension by Sharjah and Iran of their *territorial waters*:



1. The 1964 seabed border agreement between Sharjah and Umm, approved by Great Britain, is based upon a map showing that *Abu Musa had no continental shelf rights beyond its territorial sea.*[1]

2. The concession granted by Umm to Occidental in 1969, with the approval of the British Government, extended to the *territorial water limits of Abu Musa.*[2]

3. The concession granted by Sharjah to Buttes six weeks later, in December 1969, also "conformed to the 1964 treaty", Opinion of the Court of Appeals, 577 F.2d at 1199, *and therefore was necessarily bounded by the limit of Abu Musa's territorial waters.*[3]

---

[1] The 1964 seabed border agreement, as the Court of Appeals found, "was embodied in an admiralty map establishing the continental shelf of Umm as extending to the three-mile territorial waters of Abu Musa". Opinion of the Court of Appeals, 577 F.2d at 1199. Obviously, therefore, neither Sharjah, Umm, or Great Britain considered that Abu Musa had an independent continental shelf.

[2] "The boundaries to [Occidental's] concession conformed to those established by Umm by the treaty with Sharjah of 1964. The British Foreign Office ratified the concession agreement as a condition precedent required under the protectorate." Opinion of the Court of Appeals, 577 F.2d at 1199.

[3] The Sharjah-Buttes concession included the whole of Sharjah's continental shelf. The British Government approved the Sharjah-Buttes concession on the basis that it did not infringe upon the Umm-Occidental concession, as defined by the map approved by the British Foreign Office. (Petition for Certiorari, Appendices C and D.)

4. Buttes' press release announcing the award of the Sharjah concession demonstrates that Buttes itself understood that its concession did not conflict with Occidental's concession, and therefore *could not have extended beyond the limit of Abu Musa's territorial sea.*[4]

5. Sharjah's fraudulent, back-dated decree on which Buttes' claim to Occidental's oil find is based, *speaks only in terms of territorial waters,* and would have been wholly unnecessary if Abu Musa had continental shelf rights in the area of Occidental's oil find.[5]

6. A "Supplementary Decree" issued by Sharjah on April 5, 1970, shortly after it announced its "unpublished" back-dated decree, also *speaks only of territorial waters.*

7. Shortly after announcement of the back-dated decree, Sharjah and Buttes amended their concession. *The only change made by the amendment was the addition of an express reference to twelve-mile territorial waters.*[6]

[4] "Buttes' concession is bounded on the north and east by a recently awarded concession to Occidental Petroleum . . . ." Buttes' Press Release dated December 30, 1969.

[5] The fake Sharjah decree (which both Great Britain and the United States promptly rejected in writing) purported "to extend its territorial waters from three to twelve miles, including those of Abu Musa. This unilateral decree did substantial violence to the 1964 treaty. . . ." Opinion of the Court of Appeals, 577 F.2d at 1199.

[6] The amendment merely changed the definition of "concession area" by adding after the words "territorial waters of the said islands" the parenthetical phrase "(said territorial waters extending twelve nautical miles from the base lines on the mainland and on said islands)". The original Sharjah-Buttes concession already included Sharjah's whole continental shelf. If Abu Musa had independent continental shelf rights to the area of Occidental's oil find, the amendment of the concession would have been pointless and unnecessary.



8. The British Government promptly rejected Sharjah's effort to grab a portion of Umm's continental shelf. The letter to the Ruler of Sharjah from the British Political Agent *speaks solely in terms of territorial waters.*[7]

9. The claim of Iran to the area of Occidental's oil find was based solely on Iran's unilateral illegal contention of *"twelve-mile territorial waters".*[8]

10. The Memorandum of Understanding executed by Sharjah and Iran four days before termination of the British special treaty relations merely grants to Buttes the right to exploit minerals of Abu Musa *"beneath its territorial sea".*[9]

[7] "As a matter of international law, it is not right for a state *simply to extend its territorial waters* regardless of the consequences on its neighbors. * * * It is not right simply to ignore the existence of the *sea boundary* and the concession area of Occidental of Umm al Qaiwain." Letter to Ruler of Sharjah from J. L. Bullard, British Political Agent, dated May 16, 1970. (Emphasis added)

[8] The National Iranian Oil Company so wrote in a letter to Occidental in 1970. Shortly thereafter, the National Iranian Oil Company once again wrote to Occidental, to "reaffirm" Iran's position concerning the rights of Iran "over . . . *its twelve-mile territorial waters*" and over Abu Musa. (Emphasis added)

[9] The Memorandum, dated November 26, 1971, provides that neither Iran nor Sharjah would recognize the claim of the other to Abu Musa; that both would recognize the breadth of the island's territorial sea as twelve miles; and that Buttes would conduct "exploitation of the petroleum resources of Abu Musa *and of the seabed and subsoil beneath its territorial sea".* (Emphasis added)

11. On the date of the Sharjah-Iran Memorandum of Understanding, the president of Buttes wrote a letter to the National Iranian Oil Company, expressly confirming the understanding that Buttes would conduct "exploitation of the petroleum resources of Abu Musa *and of the seabed and subsoil beneath its territorial sea*". (Emphasis added)

12. The Government of Iran confirmed these arrangements "with respect to Abu Musa *and its territorial sea*".[10] (Emphasis added)

The exclusive basis for seizure of Occidental's oil find was, therefore, the claim of Sharjah and Iran to a twelve mile territorial sea. The continental shelf rights of Abu Musa are an afterthought concocted for purposes of this lawsuit.

[10] The National Iranian Oil Company sent a letter to Buttes dated November 27, 1971, reading in its entirety as follows:

> Pursuant to the acceptance of certain arrangements with respect to Abu Musa *and its territorial sea*, I confirm that National Iranian Oil Company on behalf of the Government of Iran accepts that your company or its subsidiaries can proceed with operations under the terms of your letter of 23 November 1971. (Emphasis added)



## II.

## RESPONDENTS' CONTENTION CONCERNING THE CONVENTION ON THE CONTINENTAL SHELF IS JUSTICIABLE AND WOULD BE FOUND GROUNDLESS.

Respondents raise on appeal the unprecedented claim that the 1958 Convention on the Continental Shelf confers on the tiny island of Abu Musa seabed mineral rights beyond its territorial sea. The Court of Appeals held that this contention presents a non-justiciable political question.

The Convention on the Continental Shelf is a treaty of the United States.[11] Cases arising under it are the subject of mandatory Federal jurisdiction. "The judicial Power shall extend to all Cases . . . arising under . . . Treaties . . ." U.S. Const. Art. III, §2.

Despite the mandate of Article III, the court below found the legal issues presented by Respondents' contention to be "unmanageable" and therefore non-justiciable under *Baker* v. *Carr*, 369 U.S. 186 (1962). This application of the manageability standard is error, for this court elsewhere in *Baker* v. *Carr* made clear that Federal courts can construe a treaty in a manner not inconsistent with subsequent Congressional legislation. *Id.* at 212. The *Sabbatino* case specified that where there is a treaty the court must decide suits thereunder.[12] *Id.*, at 428. A court cannot avoid its duty to construe the laws and treaties of the United States by assuming them "unmanageable".

[11] The Convention on the Continental Shelf was ratified by the United States and proclaimed by the President as taking effect as of June 10, 1964; 15 U.S.T. 471, TIAS 5578, 499 U.N.T.S. 311.

[12] This Court limited the holding of *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428 (1964), to disputes "in the absence of a treaty . . . regarding controlling legal principles".

The 1958 Convention on the Continental Shelf gives coastal states sovereignty over minerals on the continental shelf. Where two or more coastal states share a continental shelf, the Convention provides rules for setting a boundary. These rules patently place Occidental's oil find within the exclusive jurisdiction of Umm, Occidental's grantor.[13]

Respondents argue that under the Convention, islands may have continental shelf rights, and then conclude that every island, no matter how insignificant, has its own continental shelf. This contention makes nonsense of the Convention and is contrary to universal practice. England, Ireland and Greeenland are islands but clearly, in the implementation of the Convention, are not equated with the numerous islets that exist in the Persian Gulf and elsewhere. Respondents, by ignoring this distinction, have seized upon the general language of Article I(b) of the Convention to justify their grotesque interpretation that continental shelf rules designed for countries, also apply to islets.[14] Respondents thus distort the broad language of the

[13] Pursuant to Article VI (1) of the Convention on the Continental Shelf, the delimitation of the continental shelves between countries with coastlines opposite to each other is, in the absence of agreement, the median line between the two coasts. Occidental's oil find lies approximately 10 miles within Umm's side of the median line between the coasts of Iran and Umm. In accordance with Article VI(2) relating to adjacent coastal states, the seabed border between Umm and Sharjah was established by the 1964 agreement. Occidental's oil find lies approximately four miles on Umm's side of that border.

[14] Respondents cite the Channel Islands Arbitration in support of their claim for a continental shelf of Abu Musa. (United Kingdom of Great Britain and Northern Ireland and the French Republic, Court of Arbitration); (June 30, 1977) (The English Channel Arbitration); see also Note: "The United Kingdom-France Continental Shelf Arbitration" in 72 American Journal of International Law 95 (1978).

In the Channel Islands Arbitration, the Court drew a clear distinction between "small islands" and the Channel Islands which, the Court found, "possess[ed] a considerable population and a



Convention in an effort to avoid the three-mile rule of the territorial sea.

In support of the ludicrous claim that Abu Musa should "share" the continental shelf with the coastal states "on usual median-line principles", respondents (at pp. 5 and 11 of their Brief) cite maps and studies prepared by the Geographer of the State Department. Examination of all 32 maps cited reveals *not a single case* in which an island comparable to Abu Musa has shared a coastal state's continental shelf through "usual median-line principles." The six maps dealing with the Persian Gulf[15] show that many islands like Abu Musa are simply disregarded in delimiting the continental shelf.[16] Where the Persian Gulf islands are

substantial agricultural and commercial economy" as well as being "clearly territorial and political units which have their own separate existence, and which are of a certain importance in their own right separately from the United Kingdom" and "enjoy[ing] a very large measure of political, legislative, administrative and economic autonomy". (id. par. 184). Under these criteria, the tiny and sparsely populated Abu Musa without any administrative independence, commerce or industry, can hardly be compared with the important, prosperous and administratively independent Channel Islands. Abu Musa is populated by some 800 subjects of Sharjah. Compare the Channel Islands: Guernsey, population—47,000; Jersey—population 63,000.

Northcutt Ely, one of respondents' counsel on Respondents' Brief in Opposition has published an article demonstrating the absurdity of applying continental shelf rules to an "isolated islet" with the effect of attributing to its owner "areas of the seabed extending possibly hundreds of miles from its small coast and encompassing seabed areas which are thousands of times as great as the islet's land area." Northcutt Ely, *Seabed Boundaries between Coastal States; The Effect Given to Islets as "Special Circumstances"*, Int'l Lawyer, vol. 6, no. 2 at 219.

[15] U.S. State Department, Office of the Geographer, "Limits in the Seas," Nos. 12, 18, 24, 25, 63 and 67.

[16] *See e.g. id.*, No. 12, which shows the continental-shelf boundary between Saudi Arabia and Bahrain. The Geographer's analysis notes that "small islands between the coasts were not utilized in determining the midpoint between Bahraini and Saudi Arabian territory"; *id.*, No. 25, where the Geographer notes that "the pres-

not ignored entirely, the controlling principle in determining the seabed boundary is the islands' territorial sea.[17]

The map annexed to Occidental's concession agreement (Petition Appendix C) clearly follows the settled rule for determining continental shelf boundaries in the Persian Gulf. Moreover, the latest scholarship on this question shows the continuing application of the territorial sea as the measure of small islands' mineral rights.[18]

***Three conclusions follow from this analysis:***

1. That the three-mile rule is untouched by the specious new argument to extend it illimitably on the pretext of a continental shelf.

2. That by treaty and international law as well, the issue raised by respondents' argument, no matter how groundless, is justiciable.

3. And even more, that as a matter of law the theory of a "Political Question" derived from respondents' argument is inapplicable and must be rejected.

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ence of all islands in the Persian Gulf was disregarded" in the continental shelf boundary between Iran and Qatar.

[17] *See e.g. id.*, No. 18, which shows a situation strikingly similar to Umm and Sharjah. The continental shelf boundary between Abu Dhabi and Qatar—two other states on the Trucial coast—forms a semicircle around an island in the middle of the Gulf. The Geographer describes this semicircle as "an arc around Dayyinah [an Abu Dhabi island] which marks the three-mile territorial sea of the island." Similar arcs determined by the *territorial sea* of islands comparable to Abu Musa appear in No. 24 (Iran-Saudi Arabia), No. 63 (Iran-Dubai) and No. 67 (Iran-Oman).

[18] See e.g., D. Karl, *Islands and the Delimitation of the Continental Shelf: a Framework for Analysis*, 71 Am.J. Int'l L. 642 (1977). Karl points out (at p. 660) that an island located outside of the territorial waters of the state to which it belongs "should not be used as a basepoint, nor should it be given any other effect in the delimitation other than the allocation of its *territorial sea*".



## CONCLUDING DISCUSSION

The advice of the counsel to the State Department derailed the inevitable conclusion that this case should be tried on its merits. The theory of a "Political Question" was bowed to for the first time in the Court of Appeals. Mistakenly it was thought that Iran's rights were affected. We have shown that irrespective of who owned Abu Musa, Iran's royalties, past or future, from the oil find would not suffer one cent, nor its boundary lines, nor any other rights of Iran, Sharjah, or any other state. Only the attached property in the United States before the Court could be affected.

Aside from the falsity of the fear, we decried judicial abstention based on what we described as "transistory" consideration of State Department policy in an "ever changing configuration of foreign powers". How transitory! Since our Petition was filed, the Shah no longer rules, and Americans are fleeing Iran. The rationalization of a "Political Question" has vanished; and Hickenlooper's moral mandate to remove the stigma of "thieves market" remains.

• • • • • • •

A pronouncement of this Court that citizens may have access to our judicial system to determine rights to confiscated property brought into our borders, is desperately needed. It would do away with confusion and uncertainty.

To stimulate exploration of new energy sources is a vital national interest. The risk of such search is high. (Occidental's cost of seismographic exploration alone in this case was millions of dollars). What would be more discouraging to an investor than to know that even if he is successful, an avaricious competitor may seize his find and use the United States as a haven to protect him from the victim?

In a world seething with terrorism, hijacking and seizure of property, respondents' assertion that court doors should be closed to victims needs review and reversal.

Congress expressed its view clearly in the Hickenlooper Amendment. The Court of Appeals has changed the words "no court shall decline" to decide a case—to read "a court *must* decline" to decide a case. Many litigants and courts will be perplexed by this holding and will await this Court's guidance towards legal and moral imperatives.

Respectfully submitted,

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# APPENDIX

**As to the respondents' argument that Hickenlooper does not protect mere contract claims:**

Occidental's forty-year exclusive oil concession is not a mere contract claim, but is clearly property, and is so classified under international law, the law of civilized nations, and the laws of every state of the United States, including Louisiana. Even the respondents have conceded this issue below.

> "... a 40 year exclusive right to explore for and exploit oil and gas is a substantial property interest in American law [citing cases] * * * that Occidental's concession right was a sufficient interest for Hickenlooper purposes is equally plain." (Respondents' Reply Brief in the District Court in Support of Motion to Dismiss and/or for Summary Judgment, p. 17.)

**As to the respondents' argument that Occidental took its concession subject to a boundary dispute between sovereigns, and could get no better title than that of its grantor, Umm Al Qaywayn:**

The respondents cite various cases for the proposition that interests conferred by a sovereign in lands that are claimed by another sovereign are taken subject to resolution of the conflicting sovereign claims. Respondent's Brief in Opposition, p. 27. This is not the law. Where territory changes from one sovereign to another the change is subject to vested rights existing at the time. Any confiscation without compensation is a clear violation of International Law.

**As to the respondents' argument that Occidental is barred from recovery because Umm purported to cancel its concession:**

Umm purported to cancel Occidental's concession in June 1973, some eighteen months after Umm had been ousted from sovereignty and the concession had been confiscated. When it lost sovereignty, Umm lost power and jurisdiction over the area, and had no more authority to terminate Occidental's concession than did the president of Nicaragua. Occidental paid rentals at the rate of $1,000,000 per year until the confiscation occurred. It was surely not obligated to pay rentals to Umm or anyone else after the concession was confiscated. In any event, this is a fact issue that requires a trial.

**As to the respondents' argument that the prior California antitrust case should be given res judicata effect here:**

The district court rejected the respondents' plea of res judicata. The California antitrust case was filed and dismissed before the annexation of Occidental's concession area, before the confiscation of the concession, and before shipment of oil into the United States. The California court refused to apply Hickenlooper, since no actual confiscation had occurred at that time. The present action, which is based on the occurrence of a confiscation and shipment of proceeds into the United States, is a different cause of action from the antitrust suit brought years before and moreover could not have been brought at the time the first suit was dismissed, since the requisite facts had not yet occurred. Therefore, the California suit has no res judicata effect in this case. *Restatement of Judgments,*



Section 54 (1942). See also *Lawlor* v. *National Screen Service Corporation,* 344 U.S. 322, 326 (1955).

**As to the respondents' argument that the prior California action should be given collateral estoppel effect in this case:**

The district court also rejected this argument. The factors that bar application of res judicata here also foreclose application of collateral estoppel. *Commissioner of Internal Revenue* v. *Sunnen,* 333 U.S. 591 (1948). See also: 1B *Moore's Federal Practice,* ¶ 0.448 at p. 4232.

**As to the respondents' argument that the act of state doctrine applies because the complaint "calls into question" acts and motives of foreign states:**

This is not so. The only act of state that Occidental asks the court to hold illegal is the confiscation of its concession. The other sovereign acts alleged in the complaint are merely facts, whose legality is not at issue. The act of state doctrine relates solely to the adjudication of the *illegality* of acts of foreign sovereigns. *Underhill* v. *Hernandez,* 168 U.S. 250 (1897). Moreover, the Hickenlooper Amendment prohibits the Court from declining to decide this case on the ground of the act of state doctrine.

**As to the respondents' argument that Sharjah and Iran are indispensable parties:**

The district court below rejected the respondents' argument of indispensability. The Court correctly observed that "[As] to Sharjah and Iran, the alleged confiscating sovereigns, a holding of indispensability would render illusory the very rights that the Hickenlooper Amendment

seeks to preserve". 396 F. Supp. at 468. Because of jurisdictional impediments and sovereign immunity, if a confiscating sovereign were indispensable Hickenlooper could never be invoked unless the sovereign voluntarily joined the action.

In the language of Rule 19, there is no basis upon which the court can reasonably conclude that this action should "in equity and good conscience" be dismissed because of the absence of Sharjah and Iran. The complaint seeks only recovery of the oil, and seeks no relief against Sharjah or Iran, who have already received and will continue to receive the royalties payable with respect to the oil. A judgment recognizing Occidental's right to the converted oil would not threaten the present sovereignty of Sharjah and Iran over the valuable portion of Occidental's concession area, which they now permanently occupy.

In *Zwack* v. *Kraus Bros. & Company,* 237 F.2d 255 (2d Cir. 1956), the Second Circuit Court of Appeals held that a confiscating power is not indispensable in an action by the victim to recover the property taken because the taking of private property without compensation "offends the morals and violates the public policy of the United States". (237 F.2d at 258).

**As to the respondents' argument that Umm Al Qaywayn is indispensable:**

The district court also properly rejected this argument. The judgment sought in this case, recovery of oil brought into the United States, requires merely a finding that Umm Al Qaywayn was sovereign when Occidental's concession



was granted, and that Occidental's concession was valid and in effect at the end of 1971 when Umm was ousted from sovereignty and the concession was confiscated. The complaint seeks no relief against Umm and no interest of Umm is at stake.

No. 78-910

# In the Supreme Court of the United States

OCTOBER TERM, 1978

OCCIDENTAL OF UMM AL QAYWAYN, INC., PETITIONER

*v.*

CITIES SERVICE OIL CO., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted in response to the Court's invitation of February 26, 1979.

### QUESTION PRESENTED

Whether, in the context of this case, the courts of the United States may adjudicate a controversy between private parties that would require the determination of a maritime boundary dispute between foreign nations.

### STATEMENT

This case concerns the ownership of oil that has been extracted from a concession area located in the Persian Gulf and imported to the United States by respondents. The action was initiated by petitioner, Occidental of Umm Al Qaywayn, Inc. ("Occidental"),

which attached the oil upon its entry into this country. All parties to the litigation are United States corporations.

1. In November 1969, petitioner obtained a concession to extract oil from a seabed area in the Persian Gulf from the Trucial Sheikhdom of Umm Al Qaywayn, located on the southwestern coast of the Persian Gulf. It is alleged that this concession area extended from the coast of Umm Al Qaywayn to within three miles of the island of Abu Musa, which is located approximately half-way, or 45 miles, across the Persian gulf from Umm Al Qaywayn toward Iran. Petitioner alleges that the extent of its concession area was determined, in part, by an agreement or understanding between Umm Al Qaywayn and the neighboring Sheikhdom of Sharjah (which claimed ownership of the island of Abu Musa) under which the latter agreed to assert only a three-mile territorial sea for the island.

After obtaining its concession, petitioner commenced exploratory operations and, in 1970, discovered a productive oil field located approximately nine miles from Abu Musa and within the claimed concession area.

Shortly after petitioner obtained its concession, Buttes Oil Company obtained a similar concession from Sharjah to extract oil from the seabed area subject to the jurisdiction of Sharjah. This concession included the territorial waters surrounding the island of Abu Musa. In 1970, Sharjah published a decree (which petitioner claims was "back-dated" to September 1969 (Pet. 7)) by which it claimed a territorial sea of 12 miles surrounding the island of Abu Musa. The territorial sea thus proclaimed encompassed the productive oil field that petitioner had then recently discovered on the floor of the Persian Gulf.



2. Before Umm Al Qaywayn and Sharjah could resolve their territorial claims in the Persian Gulf seabed, the situation was further complicated by the reinstatement of a historical claim to the island of Abu Musa by Iran. Iran claimed that Abu Musa and two other islands located in the mouth of the Persian Gulf were historically Iranian territory and also announced that the islands possess a 12-mile territorial sea that is also within Iranian sovereignty. Iran notified petitioner in May 1970 that it must cease all operations within these claimed territorial waters, and petitioner did so (Pet. App. A-5).

3. In 1971, Iran and Sharjah entered into an agreement toward resolving their dispute over the ownership of Abu Musa. Pursuant to this agreement, (1) Iran occupied the island with military troops, (2) the oil concession granted to Buttes by Sharjah was ratified by Iran, (3) Sharjah and Iran agreed to divide equally all royalties on oil extracted from the concession area, and (4) both nations agreed that the Buttes concession area extended to the limits of the territorial waters of the island of Abu Musa, which they claimed to reach 12 miles from the island. Subsequently, Umm Al Qaywayn and Sharjah also resolved their dispute over this seabed area, under an agreement by which Sharjah agreed to pay thirty percent of its oil royalties from the disputed area to Umm Al Qaywayn.

These events evidently strained the previously amicable relations between petitioner and Umm Al Qaywayn. In June 1973, Umm Al Qaywayn terminated petitioner's concession for failure to make certain royalty payments (Pet. App. A-6).

In 1974, respondents began to extract oil from the productive area that petitioner had discovered and to

ship it to the United States. Petitioner attached the oil as it entered American ports. The oil has been released by agreement of the parties pending the outcome of this litigation (Pet. App. A-6 & n.3).

4. The district court granted respondents' motion for summary judgment. The court held that petitioner's claim of superior title to the oil was based on a challenge to the lawfulness of the acts of foreign sovereigns and was therefore barred by the act of state doctrine (Pet. App. B-12 to B-16). The court ruled that the Hickenlooper Amendment, 22 U.S.C. 2370(e)(2), did not remove the bar of the act of state doctrine in this case (1) because the agreement of sovereigns to resolve an existing territorial dispute did not constitute a "confiscation" of any claims in the disputed area, (2) because the Amendment does not apply to contract claims such as concession rights, (3) because petitioner's concession had been cancelled by Umm Al Qaywayn *before* the attached oil was extracted, and (4) because the court cannot resolve a boundary dispute between foreign nations. (Pet. App. B-18 to B-21).

The court of appeals concluded that petitioner's claim was nonjusticiable. It held that the resolution of the foreign boundary dispute in this case presented a political question that the courts of the United States may not determine (Pet. App. A-9 to A-17).

## ARGUMENT

The monetary stakes in this case are substantial, and the question presented with respect to the scope of the judicial function is both important and sensitive. But the decision of the court of appeals is correct, and it does not conflict with the decisions of this Court or of any court of appeals. Moreover, the factual context of this litigation is unusual, and there is nothing to



suggest that the issue presented here is likely to recur with any regularity, if at all. We therefore submit that review by this Court is not warranted.

1. Assuming, as we do, that petitioner obtained a concession from Umm Al Qaywayn to extract oil in the disputed area, the initial question posed in this litigation is whether Umm Al Qaywayn had power or authority to grant any concession in that area. Petitioner contends that, at least vis-a-vis Sharjah, Umm had such authority because there was a prior understanding or agreement between Umm and Sharjah that limited to three miles the territorial sea of Abu Musa. Petitioner contends that any more recent claims by Sharjah to a 12-mile territorial sea are in conflict with the previous understanding between these two sovereigns (Pet. 6-10). While petitioner does not assert that Sharjah could not "annex" this additional territory, petitioner insists that, when Sharjah did so, it was obligated by international law to respect petitioner's "vested concession rights" in the area (Pet. 10).

We may assume, *arguendo*, that the claim recited thus far, based as it is on an alleged agreement between sovereigns, might be determined in a court of the United States.[1] But there is nothing in the record to suggest that Iran also had agreed to limit its sovereign claims to Abu Musa and the adjacent seabed. For at least a century, Iran has claimed

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[1]For reasons discussed below (pages 7 to 9), such a claim would be justiciable only if it were based on proof of an existing sovereign agreement to allocate the continental shelf in the manner asserted or on a declaration by the Executive Branch recognizing the foreign boundaries. The latter is plainly lacking, and it would appear that the former could not be established.

sovereignty over Abu Musa. In 1892 and 1897, Iranian sovereignty over the island was recognized in unofficial British survey maps, and in 1904 Iranian officials temporarily occupied the island (Pet. App. A-3). Iran removed these officials at Britian's urging but did not abandon its claim to the island (*ibid.*). When the British protectorate over the Trucial Sheikhdoms was approaching termination in 1971, Iran renewed its historic claim to Abu Musa and, upon reaching agreement with Sharjah, occupied the island and adopted Buttes as its concessionaire. In doing so, Iran announced that the waters within 12 miles of Abu Musa, including the disputed concession area, were within its sovereign territory (*id.* at A-4 to A-5).

a. The United States agrees with petitioner (Pet. 14-16) that, if this case involved *only* the question of the validity of the claim of a 12-mile territorial sea for Abu Musa, the case might be justiciable.[2] The United States does not recognize unilateral claims for territorial seas in excess of three miles from the coastline. Indeed, the United States has objected to the 12-mile claim for Abu Musa asserted by Sharjah and Iran

[2]In its brief as *amicus curiae* in the court of appeals, the United States argued that disputes over the seaward limits of territorial waters raise a political question. To the extent that the brief suggested that every such dispute does so, it was incorrect. As petitioner points out (Pet. 14-16), the United States does not recognize unilateral sovereign claims to territorial seas beyond three miles. The United States does recognize that a nation may, under international law, claim jurisdiction over waters that would otherwise be high seas on the basis of an historic exercise of jurisdiction over those waters. See, *e.g.*, *United States* v. *Alaska*, 422 U.S. 184 (1975). However, a dispute between foreign nations over such a claim would, in the absence of a determination by the Executive, be nonjusticiable for reasons similar to those discussed at pages 7 to 9, *infra*.



in this controversy.[3] Since the United States does not recognize a claim of sovereignty based on a territorial sea in excess of three miles, the courts may reject on the merits an otherwise justiciable claim based on Iranian sovereignty in the disputed area which rests on this basis alone. See *United States* v. *Texas*, 143 U.S. 621, 638-639 (1892); *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 307, 309 (1829).

b. But the question of sovereignty in the disputed area does not rest simply on the extent of the territorial sea of Abu Musa. The disputed area is located approximately 40 miles from Umm Al Qaywayn and nine miles from Abu Musa; it is thus, in our view, not within the territorial sea of any sovereign. The area could be subject to the sovereignty of Iran, Sharjah, or Umm Al Qaywayn only by application of the continental shelf doctrine, and not as a result of any present claim based on a territorial sea. As the court of appeals stated (Pet. App. A-13),

[3]In 1970, the United States notified Sharjah and Iran that it would not recognize any claims based on a 12-mile territorial sea surrounding Abu Musa (App. A, *infra*, 1a-5a). At the same time, the United States noted that this objection was "without prejudice to the sovereign rights of the coastal state to explore and exploit the natural resources of the continental shelf extending from its coast * * *" (*id.* at 5a). The United States also noted that the objection to claims based on territorial sea did not (*id.* at 3a-4a)

> imply approval of any claim by Umm al Qaiwain to sovereign rights over the continental shelf up to a distance of 3 miles from the coast of Abu Musa. Division of the shelf area by agreement of the states involved is the preferred approach consistent with existing international law and such mode of division is supported by the U.S. Pending such agreement, the U.S. takes no position with respect to where the line or lines delimiting the shelf of the Gulf should be drawn.

"to determine whether a tortious conversion has occurred, it is necessary to determine the sovereign ownership of the portion of the continental shelf from which the oil was extracted." And "[i]t is evident from the record * * * that the sovereignty [of] Abu Musa, and, derivatively, its continental shelf was in dispute between Iran and Sharja (through Great Britain). Therefore, in order to resolve [petitioner's] right to possess the oil, [the court] would have to resolve the dispute over Abu Musa" (*id.* at A-11).[4]

The court of appeals correctly concluded that the "resolution of [such] a territorial dispute between sovereigns" is a political question which, in the absence of an Executive determination of sovereignty, the courts may not adjudicate (*ibid.*). This conclusion is supported by dicta in several decisions of this Court. See, *e.g.*, *United States* v. *Texas*, *supra*, 143 U.S. at 638-639; *Jones* v. *United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments * * * conclusively binds the judges * * *."); *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 744-745 (1838).[5] It is also supported by

[4]If Sharjah had sovereignty over Abu Musa, petitioner contends that Sharjah had limited its claims to the surrounding seabed by prior agreement. See page 5, *supra*. There is no such alleged limitation on the sovereign claims of Iran.

[5]See also *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 461 & n. 20 (1964) (White, J., dissenting):

> [W]ithout doubt political matters in the realm of foreign affairs are within the exclusive domain of the Executive Branch, as, for example, issues for which there are no available standards or which are textually committed by the Constitution to the executive * * *. These issues include * * * the territorial boundaries of a foreign state * * *.



an analysis of the factors established by the Court in *Baker* v. *Carr*, 369 U.S. 186, 210-211 (1961), as relevant to the identification of a political question.

The United States has consistently declined to take a position on the merits of conflicting continental shelf claims by foreign sovereigns, and in 1970 the United States specifically communicated to Iran and Great Britain its neutrality on the particular dispute involved in this case. See note 3, *supra*; App. A, *infra*, 1a-5a. It has been our foreign policy to respect agreements among nations establishing continental shelf boundaries, but not to recognize sovereign claims that remain in dispute. A determination of such conflicting claims by the courts of this country would conflict with this policy of non-recognition—with this "political decision already made," *Baker* v. *Carr*, *supra*, 369 U.S. at 217—and would embarrass the United States in the conduct of its foreign policy.[6]

2. Petitioner claims (Pet. Reply Mem. 2-10) that this case does not present any question concerning territorial border disputes because (a) Abu Musa, as an island, is not entitled to a continental shelf, and (b) Iran's claim to the waters surrounding Abu Musa was not based on a claimed continental shelf for the island but on a claimed 12-mile territorial sea (a claim which we agree may be justiciable, see page 7, *supra*).

[6]This concern is especially cogent here because, after the United States expressed its neutrality on this dispute, Iran, Sharjah, and Umm Al Qaywayn reached agreement among themselves on a division of the royalties obtained from oil production in the disputed area. A decision from the courts of the United States could undermine the stability that was obtained as a result of this sovereign agreement.

a. Even if the courts of this country could decide that Abu Musa was not entitled to a continental shelf, the political question of sovereignty over the disputed seabed area would remain. The area in dispute lies approximately half way across the Persian Gulf between Iran and Umm Al Qaywayn, though it is somewhat closer to Umm. There would be no obstacle to an Iranian claim to a continental shelf from its mainland that extended this far, though, of course, it would ordinarily be disputed by the other sovereign.[7] See Article 6, Section 1, of the Convention on the Continental Shelf, 15 U.S.T. 471, 474.

In any event, the United States has recognized that islands have continental shelves. Article 1 of the Convention on the Continental Shelf, 15 U.S.T. 471, 473, makes this express:

> For the purpose of these Articles, the term 'continental shelf' is used as referring * * * to the seabed and subsoil of * * * submarine areas adjacent to the coasts of islands.

Moreover, as early as 1955, Iran asserted a continental shelf claim for its islands in the Persian Gulf.[8] There is

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[7]The term "continental shelf" extends to submarine areas with a depth of less than 200 metres, or to deeper areas where exploitation of natural resources remains possible. Article 1 of the Convention on the Continental Shelf, 15 U.S.T. 471, 473. This definition encompasses the entire Persian Gulf. See App. A, *infra*, 4a.

[8]An Iranian statute adopted in 1955 provides:

> The areas as well as natural resources of the seabed and of the marine subsoil as far as the limits of the continental shelf extend from the coasts of Iran and of those Iranian islands in the Persian Gulf and in the sea of Oman,



thus no basis for the courts of the United States to conclude that Abu Musa lacks a continental shelf.

b. Iran, of course, is not a party to this litigation. The fact that Iran has not submitted evidence of its continental shelf claim to the disputed area should thus occasion no surprise. It is true, nonetheless, that Iran's continental shelf claims extend to the disputed area, and the record substantiates this fact.

Article 2, Section 3, of the Convention on the Continental Shelf provides that "[t]he rights of the coastal State over the continental shelf do not depend on occupation * * * or on any express proclamation." 15 U.S.T. at 473. Iran, however, has in fact made an express proclamation of its claim to a continental shelf for its Persian Gulf islands. See note 9, *infra*. The Iranian claim is referred to in documents cited in Pet. Reply Mem. (pages 9-10). See U.S. Department of State, Bureau of Intelligence and Research, Limits in the Seas, No. 24 *Continental Shelf Boundary Iran-Saudi Arabia* (July 1970); and No. 25 *Continental Shelf Boundary Iran-Qatar* (July 1970). See also Resp. Br. in Opp. 11.

The conflicting continental shelf claims of Iran and Umm Al Qaywayn are, indeed, an essential element of this case.[9] It is basic to petitioner's theory of this case that sovereignty over the disputed area is to be

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> appertain to the Iranian Government and are under the sovereignty of the Government of Iran.

Iranian Law of June 19, 1955, Article 2. See U.N. Legislative Series, National Legislation and Treaties Relating to the Territorial Sea, the Contiguous Zone, and Continental Shelf (1970).

[9]The agreement between Umm and Sharjah upon which petitioner relies (Pet. 6) purports to delimit the rights of Sharjah and Umm in their continental shelves and is evidence of claims

determined by the continental shelf doctrine, because the disputed area is so far from any coast line (including Abu Musa) that no other doctrine is applicable. The fact that the citations in the record predominantly refer to the Iranian claims as being premised on the territorial sea, rather than the continental shelf, of Abu Musa, does not alter the substance of the underlying political dispute. That dispute centers on the political question whether the continental shelf of Iran—either of mainland Iran or of Abu Musa as an Iranian possession—or of Umm Al Qaywayn extends to the area from which the oil that has been attached was produced.[10]

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by both countries to their continental shelves. The concession agreements issued by both Sharjah and Umm purported to grant rights in their respective continental shelves. *E.g.*, Pet. 10; Pet. Reply Mem. 4-5 n.6.

[10]Petitioner is incorrect in suggesting (Pet. 26-30) that the political question presented in this case is, in substance, no more than an act of state question which the courts must decide under the Hickenlooper Amendment, 22 U.S.C. 2370(e)(2). Where the act of state doctrine applies, it requires courts of the United States to recognize the validity of public acts of a recognized foreign sovereign within the territory of that sovereign. *Underhill* v. *Hernandez*, 168 U.S. 250, 253 (1897); *Pasos* v. *Pan American Airways*, 229 F. 2d 271 (2d Cir. 1956); *Banco de Espana* v. *Federal Reserve Bank of New York*, 114 F. 2d 438 (2d Cir. 1940). The act of state doctrine does not bar examination of the acts of sovereigns taken outside their sovereign territory. *Zwack* v. *Kraus Bros. & Co.*, 237 F. 2d 255 (2d Cir. 1956); *Estonian State Cargo & Passenger S.S. Line* v. *United States*, 116 F. Supp. 447, 451 (Ct. Cl. 1953); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892 (S.D.N.Y. 1968); *Republic of Iraq* v. *First National City Bank*, 241 F. Supp. 567 (S.D.N.Y. 1965). Thus, before a court can determine whether the act of state doctrine applies, it must determine whether the sovereign actions have occurred within that sovereign's territory. See *American Banana* Co. v. *United Fruit Co.*, 213 U.S. 347 (1909); *Williams* v. *Suffolk Insurance Co.*, 38 U.S. (13 Pet.) 415 (1839). Consequently, courts cannot decide in a case such as this that the act of state doctrine is applicable until it is first determined who is sovereign in the disputed area. It is that initial determination of a territorial boundary dispute among sovereigns that constitutes the political question.

Moreover, the act of state doctrine is a rule of decision, not of jurisdiction. Under the act of state doctrine the courts give presumptive validity to sovereign actions and enter judgments on the merits accordingly. *E.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 (1964); *Ricaud* v. *American Metal Co.*, 246 U.S. 304 (1918). By contrast, application of the political question doctrine forestalls adjudication of the merits because that determination can be made appropriately and effectively only by the political branches of government.



## CONCLUSION

The United States submits that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Department of State*

MAY 1979

DOJ-1979-05

**APPENDIX A**

TO : AMEMBASSY LONDON
INFO : AMEMBASSY TEHRAN
" JUDDA
" KUWAIT
AMCONSUL DHAHRAN

FROM : Department of State

SUBJECT : Territorial Sea Claims of Sharjah and Iran in Connection with the Abu Musa Problem.

REF :

1. On June 1 Iranian Embassy delivered note to Department (Annex 1) requesting Department contact Occidental and Buttes in effort to persuade them not to engage in operations in areas which constitute Iranian territory. Iranian note includes assertion of sovereign rights over territorial sea of Abu Musa including area in dispute between two oil companies. Since Iran claims territorial sea of 12 miles, this assertion has effect of claiming sovereignty around Abu Musa out to 12 miles from the coast. In view of this fact, Department has decided our reply (Annex 2) should include reaffimation of traditional U.S. non-recognition of territorial sea claims in excess of three miles. Department's reply note is being delivered to Iranian Embassy next week.

2. To be consistent, and so as not to single out Iran in this matter, Department has decided to send similar note to U.K. FCO protesting Sharjah's decree of September 10, 1969 and the Supplemental Decree of April 5, 1970. Accordingly Embassy London is instructed to deliver note per Annex 3 to FCO.

3. The following background information is intended for posts' use in connection with Annexes 2 and 3:

A. The United States has traditionally taken the position that under international law it is not bound to recognize claims to territorial waters of more than three nautical miles from the coast. The United States maintains that position today. Recently, however, the United States has announced its support for a new international convention setting the breadth of the territorial sea at 12 miles, guaranteeing free transit through and over international straits, and accommodating the special interests of coastal states in fisheries beyond the maximum permissible breadth of the territorial sea. There has been no RPT no endorsement by the United States of a 12-mile territorial sea determined by unilateral rather than international action.

B. With respect to the exercise of sovereign rights over the continental shelf as they relate to exploration and exploitation of the natural resources of the seabed and subsoil of the continental shelf, the United States is bound by and subscribes to the 1958 Geneva Convention on the Continental Shelf. Under the formula of Articles 1 and 2 of that Convention, a state's sovereign rights with respect to exploration and exploitation of the natural resources of the seabed and subsoil of the continental shelf in high seas areas beyond the limits of its territorial sea extend to a water depth of 200 meters, or beyond that point to where the superjacent waters admit of exploitation of the natural resources of the area. This formula applies to high seas areas only. A state's sovereignty within its territorial waters over the natural resources of the seabed and subsoil below those waters is complete.

Thus, a recognition by one state of an extension of another state's territorial sea entails a recognition of that state's ownership over the natural resources of the seabed areas below the territorial sea.

C. Although a state's sovereign rights over seabed natural resources coincide with its exercise of sovereignty in territorial waters, the two concepts are different with respect to high seas areas which are those beyond the maximum permissible breadth of the territorial sea. Under the depth and exploitability criteria of the Convention on the Continental Shelf and customary rules of international law, distance from shore or from the seaward limit of the territorial sea is not determinative of the extent of national jurisdiction with respect to exploration and exploitation of the continental shelf and its natural resources. There is, for example, no theory recognized by international law which permits a state to exercise exclusive jurisdiction with respect to exploitation of the natural resources of the seabed and subsoil beneath its contiguous zone as defined by the Convention on the Territorial Sea and the Contiguous Zone. The language of that Convention specifically provides that the contiguous zone constitutes an area of the high seas and this is not subject to the sovereignty of any state.

D. With particular reference to the situation of Abu Musa, failure of the United States to recognize Sharjah's claimed extension of the territorial sea to 12 miles or Iran's pre-existing claim does not prejudice either's position with respect to sovereign rights over the continental shelf if and when the soveregnty issue with respect to the island proper is settled. In no way RPT no way does the U.S. position concerning Sharjah's or Iran's territorial sea claims imply approval



of any claim by Umm-al-Qaiwain to sovereign rights over the continental shelf up to a distance of 3 miles from the coast of Abu Musa. Division of the shelf area by agreement of the states involved is the preferred approach consistent with existing international law and such mode of division is supported by the U.S. Pending such agreement, the U.S. takes no position with respect to where the line or lines delimiting the shelf of the Gulf should be drawn. This is particularly so in view of the fact that under the formula of the Continental Shelf Convention all of the Persian Gulf is "shelf" since all the waters of the Gulf are less than 200 meters deep.

4. The above information is intended for the Embassy's background use in responding to questions. If any problem arises with respect to the U.S. position on these matters which is not dealt with in the above discussion, the Embassy should request an opinion from the Department

/s/ Johnson, Acting

JOHNSON, ACTING

Annexes:
(Enclosures)

1. Iranian Note.
2. Department's reply.
3. Draft note.

## ANNEX 3

[Complimentary opening] and refers to the Decrees dated September 10, 1969, and April 5, 1970, purporting to establish the territorial waters of Sharjah at twelve nautical miles measured from the baselines of the coasts of the mainland and of the islands of the Emirate of Sharjah.

Without comment on the existing dispute with respect to sovereignty over the island of Abu Musa to which the subject Decrees also apply, and without prejudice to the sovereign rights of the coastal state to explore and exploit the natural resources of the continental shelf extending from its coast, the United States "reserves its rights and those of its nationals in all areas of superjacent waters referred to in the September 10 and April 5 Decrees seaward of the traditional three-mile limit."

The Government of the United States would be most grateful if Her Majesty's Government would kindly communicate the above information to the Ruler of Sharjah.

[Complimentary close].



## APPENDIX B

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

May 12, 1978

Honorable James W. Moorman
Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D.C.

Dear Mr. Moorman:

Your Division has asked for our views concerning certain aspects of the case of *Occidental of Umm Al Qaiwain, Inc. v. A certain Cargo of Petroleum Laden Aboard the Tanker "Dauntless Colocotonic," Etc., et al., C.A. 5, No. 75-3088.*

It is our understanding that the disposition of this case would require a determination of the disputed boundary between Umm Al Qaiwain on the one hand and Sharjah and Iran on the other at the time Umm Al Qaiwain granted the concession in issue to Occidental. It is our view that it would be contrary to the foreign relations interests of the United States if our domestic courts were to adjudicate boundary controversies between third countries and in particular that controversy involved here.

The extent of territorial sovereignty is a highly sensitive issue to foreign governments. Territorial disputes are generally considered of national significance and politically delicate. Even arrangements for the peaceful settlement of territorial differences are often a matter of continued sensitivity.

These considerations are applicable to the question of Umm Al Qaiwain's sovereignty over the continental shelf surrounding Abu Musa at the time of the concession to Occidental and to the subsequent arrangements worked out among the affected states. For these reasons, the Department of Statee considers that it would be potentially harmful to the conduct of our foreign relations were a United States court to rule on the territorial issue involved in this case.

We believe that the political sensitivity of territorial issues, the need for unquestionable U.S. neutrality and the harm to our foreign relations which may otherwise ensue, as well as the evidentiary and jurisprudential difficulties for a U.S. court to determine such issues, are compelling grounds for judicial abstention.

We do not believe that this judicial self-restraint should turn on such analytical questions as whether the so-called Act of State doctrine which is traditionally limited to governmental actions within the territory of the respective state can apply to an exercise of disputed territorial jurisdiction. It rather follows from the general notion that national courts should not assume the function of arbiters of territorial conflicts between third powers even in the context of a dispute between private parties. As a result, we are of the view that the court should be encouraged to refrain from setting the extent of Umm Al Qaiwain's sovereign rights in the continental shelf between its coast and Abu Musa at the time of its grant of the concession to Occidental.

Sincerely,

Herbert J. Hansell

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

**No. 78-910**

OCCIDENTAL OF UMM AL QAYWAYN, INC.,

*Petitioner,*

—v.—

CITIES SERVICE OIL CO., *et al.*,

*Respondents.*

## PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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## PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

The Government concedes that it erred when it advised the Court of Appeals below that claims involving territorial waters disputes were nonjusticiable. (Amicus Brief pp. 6, 7, and footnote 2) This mistaken advice permeated the Court of Appeals' rejection of jurisdiction. Another error below is conceded. The Court of Appeals held in effect that the District Court erred when it ruled that the Act of State doctrine barred relief.

So there is a chain of conceded errors and yet the Amicus Brief squeezes out of these cumulative errors a recommendation that this court should refuse even to consider the matter. This conclusion is made even more inconsistent by other admissions in the Amicus Brief:

1. The Government concedes that the question presented by this case "with respect to the scope of the judicial func-

tion" is "both important and sensitive." (Amicus Brief, p. 4.)

2. The Government concedes that the "monetary stakes in this case are substantial" (Amicus Brief, p. 4) and that the case is one of first impression as to whether a political question is presented.[1]

3. The Government concedes that the respondents' claims based on the assertion by Iran and Sharjah of 12-mile territorial waters *are justiciable* (Amicus Brief pp. 6-7); that the courts may "reject" these claims *"on the merits"* (Amicus Brief p. 7, emphasis supplied); and that the contrary position taken by the Government in its brief filed in the Court of Appeals below *"was incorrect"* (Amicus Brief, p. 6, footnote 2, emphasis supplied).

4. The Government concedes, *arguendo*, that a claim (like Occidental's) based upon an agreement between sovereigns (like the 1964 seabed border agreement between Umm and Sharjah) can be determined in a United States court (Amicus Brief, p. 5).

5. The Government concedes that the United States is bound by the 1958 Convention on the Continental Shelf, which provides that, in absence of agreement between countries with opposing coastlines, the continental shelf between them is divided by the median line between their two coasts. (Amicus Brief, p. 8).

[1] The Government cites mere dicta in support of its "political question" argument, Amicus Brief p. 8, but omits any reference to the only dictum that specifically addresses the issue and holds to the contrary. See, ***Williams v. Suffolk Insurance Co.***, 38 U.S. (13 Pet.) 414 (1839) and discussion at pp. 22-23 of Occidental's Petition for Certiorari. Furthermore, the question as to whether the Hickenlooper Amendment makes the question clearly justiciable is, to say the least, a matter of first impression.



6. The Government concedes that Occidental's oil find is on Umm's side of the median line between the coasts of Umm and Iran. (Amicus Brief, p. 10). This is consistent with Occidental's claim of title.

In view of these admissions, what possible fact or issue can obstruct consideration by our courts of this controversy?

1. The Government theorizes that Iran could have a latent continental shelf claim that could include the area of Occidental's oil find. This claim, the Government conjectures, could involve the continental shelf "either of mainland Iran or of Abu Musa", and could present a "political question". (Amicus Brief, p. 12). This argument is a baseless diversion.

A. A claim that Occidental's oil find is on the continental shelf of mainland Iran would violate the 1958 Convention on the Continental Shelf, of which the United States is a signatory. The Convention is the supreme law of the land, and cases arising under it are the subject of mandatory Federal jurisdiction. (U.S. Const. Art. III, Sec. 2) The Convention establishes the median-line principle of delimitation, in absence of agreement, and the Government has conceded that the oil find is on Umm's side of the median line. (Amicus Brief, p. 10) The oil find is therefore beyond the continental shelf of mainland Iran. This issue is justiciable under the Convention.

B. It is inconceivable, in light of the geography of the Persian Gulf and the consistent practice of the Gulf states, that independent continental shelf rights should be attributed to the island of Abu Musa, which is about the size of Central Park in New York City. (See dis-

cussion at pages 7-10 of the Petitioner's Reply Memorandum). The Government concedes that the Iranian claims are *"predominantly"* premised on the 12-mile territorial sea, "rather than the continental shelf". (Amicus Brief, p. 12) This admission does not go far enough. The fact is that the Iranian claims were based *exclusively* on an extended territorial sea of 12 miles and never on any other ground. (Petitioner's Reply Memorandum, pp. 2-6) Iran did not conceive of a continental shelf argument even after the United States rejected its claim of 12-mile territorial sea.[2] An otherwise justiciable claim cannot be put beyond the reach of courts by the interjection of a fictitious issue which is then relied upon to conjure up a political question.

2. The Government fails to address the problem of the "judicial vacuum" that would result if the Court distorts the political question doctrine into a rule of non-decision that bars adjudication of private property claims of American citizens under the Hickenlooper Amendment or otherwise. (See discussion of pages 22-30 of Petition for Certiorari).

3. This is concededly a case of first impression, or rather impressions. May citizens of the United States have their rights with respect to property shipped into the United States determined in an American Court even though two foreign governments touch on the controversy? Or does such contest automatically present a political question? If so, we would disenfranchise Americans' rights to their courts in numerous situations which traditionally come before them, i.e. situations where the applicable law depends on controverted sovereignty over a geographic location:

[2] Amicus Brief, Appendix A. We note the failure of the Government to submit two of the enclosures of this unpublished document which are not available to us.



inheritance rights, citizenship status, conflicts of laws among nations, capacity to make contracts, currency disputes, real estate titles, questions of foreign taxation, matrimonial status, legitimacy contests, and a host of others. Even boundary line disputes are justiciable where the Executive has not taken a position (*Williams v. Suffolk Insurance Company, supra*). The Government conceded in its *Amicus Brief* in the Court of Appeals below (at p. 7), "we have uncovered no case in which the Supreme Court has specifically held that cases involving boundary disputes raise nonjusticiable political questions".

The burden of delimiting a citizen's rights to his courts is heavy on the proponent, and certainly cannot be met here, where the validity of Occidental's concession had been approved and confirmed by the Protecting Country, Great Britain, which had also rejected this very Respondent's claim, and where bad faith abounds in the form of a backdated decree, the rejection by Respondent's grantor of a mediator's decision against it, and its persistent claim that the 12-mile territorial sea contention is the basis of its defense.

The judicial temple may not be invaded by an executive department of the Government which urges it to close its doors so that the political exigencies of the State Department may prevail.

4. American citizens are not to be deprived of a judicial decision even if their controversy encompassed continental shelf claims. There is no precedent for such a rule. There should be none. The words "political question" are not magical incantations to be applied by whim so as to permit executive departments to instruct the judiciary when to abdicate its constitutional duties.

The assertion that such a confiscation of property as has occurred here is "not likely to occur again, if at all," is incredible. The world is teeming with lawlessness and the rights of property as well as life are being confiscated daily. To refuse jurisdiction, even when the stolen property is brought within our borders, is to establish a thieves' market that would be flooded by adherence to such an amoral approach. At most the Government brief presents contentions that should be made at a trial. They are insufficient to bar jurisdiction.

The Amicus Brief seeks to distinguish the "Act of State" from the "Political Question" doctrine. (pp. 12-13 note 10) This technical distinction cannot survive the philosophical and constitutional tests. Both doctrines involve political questions in the generic sense. Both prevent a decision on the merits and therefore create nonjusticiability. But this principle expressed in the Act of State Doctrine so offended Congress and the President that the Hickenlooper Amendment directed that all courts must decide confiscation contests on the merits, "notwithstanding any other provision of law." The fact that the Court of Appeals characterized the "Political Question" as a "slightly different ground" from the "Act of State" Doctrine (577 Fed. 2d at p. 1198), demonstrates how thin the distinction is. The court below further sought to escape the impact of the Hickenlooper Amendment by suggesting for the first time that perhaps the Hickenlooper Amendment is not constitutional (Petitioner Appendix A-7-8), another reason why certiorari should be granted so that the murky constitutional questions in this case may be clarified.



**Possible Alternative to Writ of Certiorari**

In view of the errors now admitted to have occurred in the lower courts, we request that certiorari be granted or, at the very least, that the case be remanded to the lower court for a full evidentiary hearing, including expert and other fact testimony, to determine whether the Island of Abu Musa has an independent continental shelf within the meaning of the Convention on the Continental Shelf, adopted by treaty in 1958. If not, then the only argument remaining for the existence of a "Political Question" would disappear, and this case could then be decided on the merits without reaching any of the constitutional questions presented to this Court. Had there been such a fact determination, instead of the premature ruling presently under review, the proceedings before this Court might well have been rendered academic and unnecessary.

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